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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 368

THE DE LA RAMA STEAMSHIP COMPANY, INC.,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1952
CERTIORARI GRANTED NOVEMBER 17, 1952

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 5, 1952.

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[fols. 1-4] **IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

THE DE LA RAMA STEAMSHIP COMPANY, INC., Libellant,

vs.

UNITED STATES OF AMERICA

LIBEL OF THE DE LA RAMA STEAMSHIP COMPANY, INC.—Filed December 22, 1944

To the Honorable The Judges of the United States District Court for the Southern District of New York:

The libel of The De La Rama Steamship Company, Inc., against the United States of America in a cause of contract and insurance, civil and maritime, respectfully alleges on information and belief as follows:

First: Libellant at all the times hereinafter mentioned was and now is a corporation duly organized and existing under and by virtue of the laws of the Philippine Islands and has its principal place of business in the United States at 90 Broad Street, New York City, within this District.

Second: Respondent at all the times hereinafter mentioned was and now is a corporation sovereign. By Acts of Congress known as Suits in Admiralty Act, being Secs. 741-752 of Title 46, U. S. Code, and Merchant Marine Act, 1936, as amended, being Sec. 1128d of said Title 46, respondent has consented to be sued in this Court on the cause of action hereinafter set forth.

Third: Libellant was the sole owner of the American-Philippine Diesel vessel DONA AURORA until the time of her loss as hereinafter set forth and is sole owner of all rights and claims to recover for her said loss. Said vessel was a combination cargo and passenger vessel of about 8920 tons deadweight. Her register dimensions were length 413.3 feet, breadth 55.7 feet, depth of hold 25.4 feet. She was built in 1939 at Trieste, was of Philippine registry and flew the American flag.

[fol. 5] Fourth: Respondent on or about May 19, 1942 requisitioned libellant's said vessel DONA AURORA by telegraphic notice, a true copy of which is hereto annexed and

made part hereof, marked Schedule A. Libellant acquiesced in said requisition.

Fifth: Thereafter negotiations were had between respondent and libellant to reach an agreement for compensation to libellant for the service of said vessel and for her value, etc. under said requisition. On or about March 18, 1943, as a result of said negotiations, respondent, as represented by E. S. Land, War Shipping Administrator, entered into a requisition time charter of said vessel with libellant as of April 1, 1942 and designated Contract No. WSA-3147-R. Said charter was in two parts. Part II thereof was in the form published in the Federal Register for May 16, 1942, pages 3675-3678, hereby referred to and thus made part hereof, and of which this Court is requested to take judicial notice. Part I incorporated Part II by reference and was in the form shown by true copy thereof hereto annexed, marked Schedule B and made part hereof.

Sixth: Thereafter on or about June 2, 1944 the respondent and libellant duly amended said requisition charter by a certain Addendum No. 1 executed by respondent, as charterer, by E. S. Land, War Shipping Administrator, and by the libellant, as owner, by the terms of which libellant elected war risk valuation Option as follows:

"Part I

. . . . . .

[fol. 6] E. War Risk Insurance Valuation:

Option II—Just compensation to be determined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended, for any loss or damage due to the operation of a risk assumed by the Charterer under the terms of this Charter . . . ."

A true copy of said requisition charter, as amended by said Addendum No. 1 is hereto annexed and made part hereof, marked Schedule C.

Seventh: By the aforesaid requisition charter party, as amended, the respondent, as charterer, undertook and agreed to redeliver said vessel to libellant in due course as

provided therein, and undertook to provide and pay for or assume insurance on said vessel, as follows:

"Part I

A. Period of Charter: From the time of delivery to the time of expiration of the voyage current at the end of the emergency proclaimed by the President May 27, 1941 * * *

B. Trading Limits: World-wide.

* * * * * * *

Part II

* * * * * * *

Clause 20. Unless otherwise mutually arranged, at all times during the currency of this Charter the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, which shall include [fol. 7] malicious damage, sabotage, strikes, riots and civil commotion, insured for and valued at the amount set forth in Part I which insurance shall be made payable to the persons entitled thereto; (ii) all war risk insurance, as required, on the lives of or for injuries to officers and crew and loss of or damage to their personal effects, including sextants of deck officers, on leased equipment aboard for which the Owner is responsible to the extent not otherwise covered hereunder, on slop chests, on the actual value of the Vessel's unused consumable stores and on cash carried on board but not in excess of $5,000.00 unless otherwise agreed; and (iii) war risk protection and indemnity insurance, for the benefit of the Owner and the Charterer as their interests may appear, including Owner's liabilities to officers and crew until repatriated. * * *"

For the full terms and conditions of "the full form of standard hull war risk policy of the War Shipping Administration" aforesaid the libellant refers to such form or forms thereof as have been established and amended from time to

time by the respondent through the War Shipping Administration and published in the Federal Register, or otherwise officially, and hereby incorporates the same herein by reference with the same effect as if fully set forth herein.

Eighth: Respondent in accordance with said Clause 20 of said requisition charter party, as amended, caused the Director of Wartime Insurance to, and he did, execute and deliver to libellant under date of October 29, 1942 "War Risks Binder Covering Vessels Requisitioned by the War Shipping Administration" designated as R. C. No. 944 [or No. F. C. 944] including Endorsements Nos. 1 and 2 [fol. 8] attached to said Binder, by which the respondent by War Shipping Administration undertook and agreed to insure, and did insure for account of libellant its said vessel DONA AURORA from the time of delivery to War Shipping Administration April 1, 1942 to "termination of charter", against war risks only, subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the said Binder and to the provisions of the requisition charter party relative to said vessel accepted by libellant as the assured and any modifications or amendments thereto, as follows:

"1. *Hull*
DWT 8915 Speed 14.5 Knots Date Built 1939 Value As per charter
Amount As per charter.

2. *Crew Life and Injury*
Total Number of Men Insured for Life and Jury 50 for $5,000. each
Life or Injury
Total Amount Insured $ 250,000.

3. Crew's Effects
Total Amount Insured $ 9,300.

4. Internment Wages and Bonuses based on Annual Payroll $ 166,600.

5. War P. and I. Including Repatriation $1,604,700.

6. Consumable Stores, Slop Chests, and Leased Equipment $ 42,000.

7. Master's cash. $ 5,000.

(Estimate)"

[fol. 9] A true copy of said Binder and said attached Endorsements is annexed hereto and made part hereof, marked Schedule D.

Ninth: Respondent by War Shipping Administration duly provided the aforesaid insurance by entering and maintaining the same in the marine and war risk insurance fund established in the Treasury of the United States under the provisions of Sec. 1128, sub-division (b), of Title 46, U. S. Code.

Tenth: On December 25, 1942 libellant's said vessel DONA AURORA, while proceeding from a foreign country en route to a United States port under said requisition charter to the respondent and insured by respondent through War Shipping Administration as aforesaid, was torpedoed by enemy action on the high seas and thereby became an actual total loss, terminating all possibility of redelivery as agreed, and to the great loss and damage of libellant. At said time said vessel was being operated and employed by respondent as a merchant vessel under the aforesaid charter, as amended carrying a cargo of merchandise including skins, ore, wool, sisal, coffee, etc. under commercial bills of lading and ship's manifest in usual form.

Eleventh: By reason of said total loss of said vessel DONA AURORA, her equipment, crews' effects, slop chests, stores, leased equipment, master's cash, etc. and loss of life of and personal injuries to, members of her crew, libellant has sustained certain damages and losses for which the libellant is entitled to reimbursement from respondent, as charterer and war risk insurer, as aforesaid, under said war risk insurance provided by the respondent.

[fol. 10] Twelfth: Libellant also sustained certain damages and losses amounting to approximately $40,000 under said war risk insurance provided by respondent as aforesaid by reason of a collision on or about June 6, 1942 on the River Clyde between libellant's said vessel DONA AURORA and certain other vessels, which collision was or may be determined to have been a war risk.

Thirteenth: Libellant duly presented to the respondent through War Shipping Administration its claim with respect to libellant's aforesaid losses, but respondent has declined to agree with libellant as to the amount of just

compensation payable to libellant on account of the aforesaid loss of said vessel, or as to the amount of other losses above referred to, under the aforesaid requisition charter, as amended, or the aforesaid war risk insurance provided by the respondent, and respondent up to the time of filing of this libel has failed and refused to pay to libellant such just compensation and other sums due to libellant under and by virtue of the provisions of said requisition charter, as amended, or the aforesaid war risk insurance provided by respondent with respect to said vessel. On or about December 12, 1944 respondent by War Shipping Administration advised libellant by letter in substance that it would be impossible for settlement to be reached as to the amount of the aforesaid just compensation, etc. within two years after the loss of said vessel as aforesaid. A disagreement has arisen as to libellant's claim for losses or the amount thereof on account of insurance under Sections 1128-1128h of Title 46, U. S. Code.

Fourteenth: By reason of the premises there is now due and owing from the respondent to libellant as just compensation and insurance for said vessel and in respect of [fol. 11] other losses as aforesaid, the sum of about $2,750,000. as nearly as the same can now be estimated, together with interest thereon, no part of which has been paid although payment has been duly demanded.

Fifteenth: Libellant duly performed all the terms and conditions of said requisition charter, as amended, and said insurance agreement on its part to be performed. Respondent paid the libellant the agreed charter hire up to the time of loss of said vessel December 25, 1942.

Sixteenth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that citation in due form of law according to the rules and practice of this Honorable Court may issue against the respondent United States of America citing it to appear and answer in the premises; that upon service of a copy of this libel on the United States Attorney for this District and mailing a copy thereof to the Attorney General of the United States, and the filing of a sworn return of such service and mailing in accord-

ance with law, respondent be required to appear and answer all and singular the matters aforesaid, according to the principles of law and rules of practice obtaining in like cases between private parties, and that this Honorable Court be pleased to decree to libellant recovery for its damages and losses together with interest and costs, and that libellant may have such other and further relief as in law and justice it may be entitled to receive.

Burlingham, Veeder, Clark & Hupper, Proctors for Libellant.

(Duly verified December 22, 1944.)

[fol. 12] SCHEDULE "A" ANNEXED TO LIBEL OF THE DE LA RAMA STEAMSHIP COMPANY, INC.

[Postal Telegraph]

X6 CC4NJG 132 8·Ex Govt

D & A May 20 AM 3 49

Dx Washington DC May 19 1942

De La Rama Steamship Company Inc
17 Battery Place NYC

War Shipping Administration has previously Chartered from you following vessels: DONA AURORA, DONA ANICETA, DONA NATI

In order to carry out requisition program now in effect all of the above vessels are hereby requisitioned for use under time form charter as of date of termination of their present voyages. Requisition charter in form set forth in federal register of May 16, 1942 together with rates and insurance valuations contained in general orders 8 and 9 published Federal Register May 16, 1942 will be tendered to you as soon as possible please advise immediately whether you desire to have these rates and valuations made effective as of time of delivery under current charter, if delivery prior to January 20, effective date will be January 20.

By direction of the administrator

W. C. Peet, Jr., Secretary War Shipping Administration.

[fol. 13] SCHEDULE "B" ANNEXED TO LIBEL OF THE DE LA RAMA STEAMSHIP COMPANY, INC.

Counterpart III

Form No. 101 Contract No. WSA-3147-R
5/16/42

War Shipping Administration

Wareshiptime

Requisition Time Charter for Dry Cargo Vessel

Part I

Time Charter as of April 1, 1942, between the De La Rama Steamship Co. Inc. Address 17 Battery Place, New York, New York. Owner of the good steel MS DONA AURORA (herein called the "Vessel"), with hull, machinery and equipment in a thoroughly efficient state, as far as the exercise of due diligence can make her so, and United States of America, Charterer:

Vessel's particulars as follows:

Deadweight capacity for cargo, fresh water and stores about 8,915 tons (2240 lbs.), Including Permanent Bunkers for fuel 977 tons
On Mean Draft (British Lloyds Normal Summer Freeboard) 26 feet 5½ inches
Classed 100 A.1 at Lloyds Register of Shipping
Bale Capacity in Cubic Feet, about 417, 634
Speed about 13½ knots fully laden under good weather conditions
Consumption best grade fuel per 24 hours about 18 tons
[fol. 14] Maximum Lifts for all derricks 5 tons except one of 30 tons

Owner agrees to let and Charterer agrees to hire the vessel, from time of delivery for trading subject to the following terms:

Part I

A. Period of Charter: From the time of delivery to the time of expiration of the voyage current at the end of

the emergency proclaimed by the President May 27, 1941; Provided, That after September 1, 1942 either party may sooner terminate this Charter (the Vessel to be redelivered as hereinafter provided) upon not less than 30 days' written or telegraphic notice.

B. Trading Limits: World-wide.

C. Rate: See J-5 (a)

D. Rate Revision (Option I only): At any time after September 1, 1942, but not more often than once every 120 days, either party may request a redetermination of the rate of charter hire upon 30 days' written or telegraphic notice to the other. If a revised rate is determined and agreed upon within such 30-day period, it shall become effective as of the date specified in the determination and shall continue for the balance of the period of this Charter subject to further redetermination in accordance with the provisions of this paragraph. If a revised rate is not determined or agreed upon within such 30-day period, then the rate of hire in effect at the [fol. 15] time of such notice shall apply only until noon (EWT) of the day after the end of such 30-day period, and charter hire for the balance of the period of this Charter shall be just compensation within the meaning of Section 902 of the Merchant Marine Act, 1936, as amended, and shall be established and paid as therein provided. In such latter event, the use of the Vessel, if not theretofore requisitioned, shall be deemed to have been requisitioned pursuant to Section 902 as of noon (EWT) of the day after the end of such 30-day period. This paragraph shall not operate so as to terminate the period of, or otherwise modify the provisions of this Charter, notwithstanding any such modifications, adjustments, or terminations of the charter hire provisions of this Charter by operation of this paragraph.

E. War Risk Insurance Valuation: See J-5 (b)

F. Port of Delivery: New York, New York—April 1, 1942.

G. Port of Redelivery: Not less favorable to either party than the port of delivery, unless otherwise agreed.

H. Notice of Redelivery: Fifteen (15) days.

I. Uniform Terms: This Charter consists of this Part I and Part II, the Uniform Time Charter and Conditions for

Dry Cargo Vessels, published in the Federal Register of May 16, 1942. Unless in this Part I otherwise expressly provided, all of the provisions of said Part II shall be part of this Charter as though fully incorporated herein.

[fol. 16] J. Special Provisions:

1. Unless the Owner otherwise indicates in the execution hereof, or unless the proviso in War Risk Insurance Valuation Option I applies to the Vessel which will be indicated if the sum in said Option I is written "$ none", Rate Option I and War Risk Insurance Valuation Option I shall apply and in such event, in consideration of the compensation provided and the other obligations assumed by the Charterer hereunder, the Owner accepts this Charter in full satisfaction of any and all claims he has or may have against the Charterer arising out of the requisition of the Vessel and accepts the compensation herein provided for as the compensation required by law. If the Owner in the execution hereof elects Rate Option I and War Risk Insurance Valuation Option II, then the Owner shall accept this Charter and such hire in full satisfaction of any and all claims he has or may have against the Charterer arising out of the requisition of the Vessel and as the compensation required by law except as to any loss or damage due to the operation of a risk assumed by the Charterer under the terms of this Charter to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

[fol. 17] (Warshiptime Part I)

(J. Special Provisions, Continued)

2. (a) Based on the Owner's representations, the aggregate rate of monthly charter hire under Rate Option I (excluding any allowances under sub-paragraph d of Section 2 of Charterer's General Order No. 8) is computed as follows (subject to verification):

On Sailings prior to May 16, 1942:

This Vessel					Vessel next higher class				
Basic Rate	$	x	= $		$	x	= $		
Age Adjustment	$	x	= $		$	x	= $		
M/S Adjustment	$ .35	x	= $		$ .35	x	= $		
Speed Premium	x $ .10	x	= $		x $ .10	x	= $		
Reefer Space	$ .02	x	= $		$ .02	x	= $		
TOTAL RATE [lower amount of (i) or (ii)]			(i)	$ Not applicable			(ii)	$ Not applicable	

On Sailings on and after May 16, 1942:

This Vessel					Vessel next higher class				
Basic Rate	$	x	= $		$	x	= $		
Age Adjustment	$	x	= $		$	x	= $		
M/S Adjustment	$ .35	x	= $		$ .35	x	= $		
Speed Premium	x $ .10	x	= $		x $ .10	x	= $		
Reefer Space	$ .02	x	= $		$ .02	x	= $		
TOTAL RATE [lower amount of (i) or (ii)]			(i)	$ Not applicable			(ii)	$ Not applicable	

(b) Based on the Owner's representations the aggregate value of the Vessel under War Risk Insurance Valuation Option I is computed as follows (subject to verification):

Basic Valuation	$	x	= $
Speed Bonus	x $ 5.00	x	= $
Reefer Space	$ 1.25	x	= $
TOTAL			$ Not applicable

(c) This Charter supersedes and cancels Charter No. WSA-202 dated March 27, 1942.

(d) Satisfactory certificate of American Bureau of Shipping as to Vessel's deadweight, speed, or reefer space, will be accepted in lieu of Owner's representations and without further verification except in case of subsequent pertinent changes.

[(e) If any of the insurances which the Charterer is required to provide or assume by the terms of Clause 20 Part II of this Charter have heretofore been placed with commercial underwriters, the assumption of risks by the Charterer under Clause 20 shall be measured by the extent to which the valuation set forth in Clause J-2 (b) exceeds the amount of such commercial insurance so placed; it being understood, however, that in the event of loss the Owner shall be entitled to receive from the War Shipping Administration the difference between the valuation set forth herein and the amount of such commercial insurance outstanding at the time of loss,]* R.F.S.

[The preceding paragraph shall not limit in any respect the owner's right under paragraph 8 of General Order No. 9 to place additional War Risk insurance at its own expense in commercial or other markets beyond the amount of the valuation herein set forth or to collect the proceeds thereof in the event of loss; however, the cost of such insurance shall not be the basis of any claim against the Administrator nor shall the existence of such additional coverage be construed as evidence as to the value of the additional insurance therein.]* R.F.S.

3. With respect to reimbursement of war bonuses by the Charterer, the war bonuses for Master, officers and crew shall not be in excess of the same percentage relation to the basic wages paid as exist between the basic wages and war bonuses paid on any other American flag ship with a like [fol. 18] complement in the same service. If the Owner's arrangement is for the payment of a flat rate of wage per man, including the war bonuses, the Charterer agrees to reimburse the Owner the aggregate amount by which the aggregate flat wages paid by the Owner to the Master, officers or

* Matter in brackets struck out in copy.

crew of the Vessel during the period of this charter exceed the aggregate wages (excluding the war bonuses) which would have been payable to the Master, officers and crew of any other American flag ship with a like complement in the same service; Provided, that in no event shall any aggregate amount so to be reimbursed be in excess of the aggregate of the war bonuses which would have been payable to the Master, officers and crew of any other American flag ship in the same service.

4. The risks and liabilities insured against under (ii) and (iii) of the first paragraph of Clause 20 of Part II of this Charter shall be for amounts not in excess of those payable with respect to any other American flag vessel with a like complement of Master, officers and crew engaged in similar service.

5. (a) Pending a determination by the Charterer of just compensation for the chartered use of the vessel hereunder, the Charterer agrees to pay to the Owner lump sum payments on account in the sum of $28,080 per month. Such payments shall be made by the Charterer in the same manner as payments of hire are made under Clause 3 of Part II of this Charter, and shall commence as of the expiration of hire payments under the superseded charter (Contract No. WSA-202 dated March 27, 1942). The payments heretofore received by the Owner under said superseded [fol. 19] charter shall also be deemed lump sum payments on account of just compensation for the period covered by the terms of this Charter. All of such payments are accepted by the Owner without prejudice to any of its rights under Section 902 of the Merchant Marine Act, 1936, as amended, or any other applicable provision of the laws and Constitution of the United States.

(b) Pending a determination by the Charterer of just compensation in the event that the Vessel hereunder is actually or constructively lost, the parties hereto agree that the valuation of the vessel under this charter shall be mutually agreed upon but failing such agreement, the Charterer will tender to the Owner a sum determined by it as just compensation pursuant to Section 902 of the Merchant Marine Act, 1936, as amended. If the sum so tendered is not satisfactory to the Owner, he may accept 75 per

centum of the sum so tendered and shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation under Section 902 or any other applicable provision of the laws and Constitution of the United States.

In witness thereof, the parties hereto have executed this Agreement in triplicate the day and year first above written.

The De La Rama Steamship Co., Inc. By: R. F. Suewer, Attorney-in-Fact.

[fol. 20] United States of America. By: E. S. Land, Administrator, War Shipping Administration. By: (Illegible), For the Administrator.

As to execution for Owner.
Witness: (Signed) H. J. Griffin.

In the presence of: (Illegible), Witness and —— —— Witness.

[fol. 21] SCHEDULE "C" ANNEXED TO LIBEL OF THE DE LA RAMA STEAMSHIP COMPANY, INC.

Counterpart II

Contract No. WSA-3147-R
Addendum No. 1

Addendum to Time Charter dated as of April 1, 1942, between The De La Rama Steamship Company, Inc. ("Owner") and the United States of America, acting by and through the Administrator, War Shipping Administration ("Charterer"), covering operation of the M/S Dona Aurora (hereinafter referred to as the "Vessel").

Witnesseth

Whereas, the Owner and Charterer have heretofore entered into a charter agreement dated as of April 1, 1942, providing for the charter of the Vessel upon the terms and conditions therein set forth; and

Whereas, Special Provision J-5(a) of Part I of said Charter provides that pending a determination by the Charterer of just compensation for the chartered use of the

Vessel, the Charterer agrees to pay the Owner lump sum payments on account of such use; and

Whereas, the Charterer has determined a rate of hire for the Vessel which, in its judgment, will be just compensation for the use of the Vessel and the services required in connection with such use under the Charter, and by this Addendum has tendered, pursuant to law, a statement of such determination; and

[fol. 22] Whereas, pursuant to Clause 5 of Part II and other provisions of the Charter, the Owner has furnished a certificate of the American Bureau of Shipping as evidence of the Vessel's actual characteristics of speed and deadweight capacity, such speed having been determined in accordance with the Charterer's General Order 10, Supplement 2; and

Whereas, after examination, the Charterer has accepted such certificate as being satisfactory proof of the Vessel's actual speed and deadweight capacity, and the parties mutually desire to amend the Charter so as to reflect any change in the speed and deadweight capacity of the Vessel as represented by the Owner to the extent that hire for the Vessel and her war risk valuation, if any, may be affected; and

Whereas, the Owner and Charterer mutually desire to amend the Charter so as to fix the date upon which the Charter was actually executed to clarify their obligations to each other under said Charter,

Now, therefore, in consideration of the premises, the parties hereto agree as follows:

Effective as of its inception, Part I of this Charter shall be amended to read as follows:

[fol. 23] Form No. 101 Contract No. WSA-3147-R
5/16/42 Addendum No. 1

War Shipping Administration

Warshiptime

Requisition Time Charter for Dry Cargo Vessel

Part I

Time Charter as of April 1, 1942, between The De La Rama Steamship Co. Inc. Address 90 Broad Street, New

York, New York Owner of the good steel MS Do /A AURORA (herein called the "Vessel"), with hull, machinery and equipment in a thoroughly efficient state, as far as the exercise of due diligence can make her so, and United States of America, Charterer:

Vessel's particulars as follows:

Deadweight capacity for cargo, fresh water and stores about 8920 tons (2240 lbs.), Including Permanent Bunkers for fuel 977 tons

On Mean Draft (British Lloyds Normal Summer Freeboard) 26 feet 5½ inches

Classed 100 A.1 at Lloyds Register of Shipping

Bale Capacity in Cubic Feet, about 417,634

Speed about 14.2 knots fully laden under good weather conditions

Consumption best grade fuel per 24 hours about 18 tons

Maximum Lifts for all derricks 5 tons except one of 30 tons

* * * * * * * * *

[fol. 24] Owner agrees to let and Charterer agrees to hire the Vessel, from time of delivery for trading subject to the following terms:

Part I

A. Period of Charter: From the time of delivery to the time of expiration of the voyage current at the end of the emergency proclaimed by the President May 27, 1941; Provided, That after September 1, 1942 either party may sooner terminate this Charter (the Vessel to be redelivered as hereinafter provided) upon not less than 30 days' written or telegraphic notice.

B. Trading Limits: World-wide.

C. Rate: *Option I*—A basic rate of $4.10 per deadweight ton per month computed in accordance with the Charterer's General Order No. 8, together with any appropriate adjustments or premiums in accordance with such General Order, which full rate shall be subject to revision not more often

than once in every 120 days as in paragraph D below provided; or

Option II—75 percentum of the full rate payable in accordance with Option I above and such further sum, if any, adjudicated to be necessary to make up just compensation for the use of the Vessel and the services required in connection therewith under the terms of this Charter, pursuant to the provisions of Section 902 of the Merchant Marine Act, 1936, as amended.

[fol. 25] D. Rate Revision (Option I only): At any time after September 1, 1942, but not more often than once every 120 days, either party may request a redetermination of the rate of charter hire upon 30 days' written or telegraphic notice to the other. If a revised rate is determined and agreed upon within such 30-day period, it shall become effective as of the date specified in the determination and shall continue for the balance of the period of this Charter subject to further redetermination in accordance with the provisions of this paragraph. If a revised rate is not determined or agreed upon within such 30-day period, then the rate of hire in effect at the time of such notice shall apply only until noon (EWT) of the day after the end of such 30-day period, and charter hire for the balance of the period of this Charter shall be just compensation within the meaning of Section 902 of the Merchant Marine Act, 1936, as amended, and shall be established and paid as therein provided. In such latter event, the use of the Vessel, if not theretofore requisitioned, shall be deemed to have been requisitioned pursuant to Section 902 as of noon (EWT) of the day after the end of such 30-day period. This paragraph shall not operate so as to terminate the period of or otherwise modify the provisions of this Charter, notwithstanding any

such modifications, adjustments, or terminations of the charter hire provisions of this Charter by operation of this paragraph.

E. War Risk Insurance Valuation:

Option I—The sum of $ none per deadweight ton computed in accordance with General Order [fol. 26] No. 9 of the Charterer together with any premiums or adjustments, or any assumption of war risk, general average, collision or salvage risks or liabilities as may be provided for in said General Order and which are applicable to the Vessel by the terms of said General Order; Provided, That if said General Order No. 9 does not set forth a formula for ascertaining such valuation, then Option II below shall apply; or

Option II—Just compensation to be determined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended, for any loss or damage due to the operation of a risk assumed by the Charterer under the terms of this Charter to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

F. Port of Delivery: New York, N. Y. as of 12:01 A. M., April 1, 1942

G. Port of Redelivery: Not less favorable to either party than the port of delivery, unless otherwise agreed.

H. Notice of Redelivery: 15 days.

I. Uniform Terms: This Charter consists of this Part I and Part II, the Uniform Time Charter Terms and Conditions for Dry Cargo Vessels, published in the Federal Register of May 16, 1942. Unless in this Part I otherwise expressly provided, all of the provisions of [fols. 27-28] said Part II shall be part of this Charter as though fully incorporated herein.

J. Special Provisions:

1. Unless the Owner otherwise indicates in the execution hereof, or unless the proviso in War Risk Insurance Valuation Option I applies to the Vessel which will be indicated if the sum in said Option I is written "$ none", Rate Option I and War Risk Insurance Valuation Option I shall apply and in such event, in consideration of the compensation provided and the other obligations assumed by the Charterer hereunder, the Owner accepts this Charter in full satisfaction of any and all claims he has or may have against the Charterer arising out of the requisition of the Vessel and accepts the compensation herein provided for as the compensation required by law. If the Owner in the execution hereof elects Rate Option I and War Risk Insurance Valuation Option II, then the Owner shall accept this Charter and such hire in full satisfaction of any and all claims he has or may have against the Charterer arising out of the requisition of the Vessel and as the compensation required by law except as to any loss or damage due to the operation of a risk assumed by the Charterer under the terms of this Charter to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

[fol. 29] 2. (a) Based on the Owner's representations, the aggregate rate of monthly charter hire under Rate Option I (excluding any allowances under sub-paragraph d of Section 2 of Charterer's General Order No. 8) is computed as follows (subject to verification):

On Sailings prior to May 16, 1942:

This Vessel					Vessel next higher class			
Basic Rate	$ 4.10	x 8920	= $ 36,572		$ 3.90	x 9000	= $ 35,100	
Age Adjustment	$	x none	= $		$	x	= $	
M/S Adjustment	$ .35	x 8920	= $ 3022		$ .35	x 9000	= $ 3150	
M/S	$ .35	x 8920	= $ 3022		$ .35	x 9000	= $ 3150	
Speed Premium	4 x $ .10	x 8920	= $ 3568		4 x $ .10	x 9000	= $ 3600	
Reefer Space	$ .02	x none	= $		$ .02	x	= $	
TOTAL RATE		(i)	$ 43,162			(ii)	$ 41,850	

[lower amount of (i) or (ii)]

On Sailings on and after May 16, 1942:

This Vessel					Vessel next higher class			
Basic Rate	$ 4.35	x 8920	= $ 38,802		$ 4.15	x 9000	= $ 37,350	
Age Adjustment	$	x	= $		$	x	= $	
M/S Adjustment	$ .35	x 8920	= $ 3,022		$ .35	x 9000	= $ 3150	
Speed Premium	4 x $ .10	x 8920	= $ 3,568		4 x $ .10	x 9000	= $ 3600	
Reefer Space	$ .02	x	= $		$ .02	x	=	
TOTAL RATE		(i)	$ 45,392			(ii)	$ 44,100	

[lower amount of (i) or (ii)]

(b) Based on the Owner's representations the aggregate value of the Vessel under War Risk Insurance Valuation Option I is computed as follows (subject to verification):

Basic Valuation	$	x	= $
Speed Bonus	x $ 5.50	x	= $
Reefer Space	$ 1.25	x	= $
TOTAL			$ not applicable

3. For the period commencing from midnight, June 30, 1942, until 10:30 A. M. December 25, 1942, [midnight, November 30, 1943, R. F. S., R. L.]* the Charterer shall deduct the sum of $60.00 per day from hire accruing under this Charter. However, it is agreed that for the purpose of applying the "recapture" provisions of the Charterer's General Order 12, as amended, in connection with the earnings of the Owner under a certain Time Charter's Service Agreement executed with the Charterer, the Owner shall be deemed to have received during said period an allowance for administrative and general expenses equivalent to $65 per day for the vessel.

4. [Charter Party MC 2300 dated December 31, 1941, will apply through midnight Standard time at the port of delivery thereunder, January 19, 1942. Thereafter this charter will apply and said Charter shall be superseded and cancelled hereby with the time of delivery hereunder to be deemed as of that time.] * R. F. S., R. L.

5. With respect to reimbursement of war bonuses by the Charterers, the war bonuses for Master, officers and crew shall not be in excess of the same percentage relation to the basic wages paid as exist between the basic wages and war bonuses paid on any other American flag ship with a like complement in the same service, and in no event shall the war bonuses exceed that pay- [fol. 30] able to the Master, officers and crew of any other American Flag ship with a like complement in the same service. If the Owner's arrangement is for the payment of a flat rate of wage per man, including the war bonuses, the Charterer agrees to reimburse the Owner the aggregate amount by which the aggregate flat wages paid by the Owner to the Master, officers or crew of the Vessel during the period of this charter exceed the aggregate wages (excluding the war bonuses) which would have been payable to the Master, officers and crew of any other American flag ship with a like complement in the same service: Provided, that in no event shall any aggregate amount so to be reimbursed be in excess of the aggregate of the war bonuses which

* Struck out in copy.

would have been payable to the Master, officers and crew of any other American flag ship in the same service.

6. The risks and liabilities insured against under (ii) and (iii) of the first paragraph of Clause 20 of Part II of this Charter shall be for amounts not in excess of those payable with respect to any American flag vessel with a like complement of Master, officers and crew engaged in similar service.

7. Lump sum payments on account of just compensation heretofore received by the Owner under this Charter shall be adjusted and credited against sums payable under this amended Part I.

8. Any other provisions of this Charter or any amendment thereto to the contrary notwithstanding, no hire or other moneys which the Charterer or the Owner is obligated to pay to the other under this Charter or [fol. 31] any amendment thereto shall become due and payable before the execution of this Charter, which occurred on March 18, 1943.

9. The Charterer agrees that the certificate of the American Bureau of Shipping furnished by the Owner as evidence of the Vessel's actual characteristics of speed and deadweight capacity, is satisfactory and accepted by the Charterer as conclusive and binding evidence of such characteristics of the Vessel.

In witness whereof, the parties hereto have executed this agreement in quadruplicate on June 2nd, 1944, and the Owner has elected Rate Option I and War Risk Insurance valuation Option II.

The De La Rama Steamship Co., Inc., (Signed) by R. F. Suewer, Attorney-in-Fact; United States of America, by E. S. Land, Administrator, War Shipping Administration. (Signed) Ross Langdon, for the Administrator.

Approved as to form: (Signed) (Illegible), Assistant General Counsel, War Shipping Administration.

[fol. 32] SCHEDULE "D" ANNEXED TO LIBEL OF THE DE LA RAMA STEAMSHIP COMPANY, INC.

War Risks Binder
Covering Vessels
Requisitioned by the

R. C. No. 944
Cancels and supersedes
Binder T. C. 1142

War Shipping Administration
Division of Wartime Insurance
Washington, D. C.

The War Shipping Administration hereby insures against War Risks Only the risks as listed in schedule below: As required by Article 20 of the Charter Party:

Assured The De La Rama Steamship Company, Inc.
Address 17 Battery Place, New York, New York.
Vessel DONA AURORA Flag U. S.
From Time of delivery to War Shipping Administration about April 1, 1942.

To Termination of charter:

1. *Hull*
   DWT 8915 Speed 14.5 Knots Date Built 1939 Value As per charter Amount As per charter
2. *Crew Life and Injury*
   Total Number of Men Insured for Life and Injury 50
   for $5,000. each
   Life or Injury
   Total Amount Insured $250,000
3. Crew's Effects
   Total Amount Insured $9,800
[fol. 33] 4. Internment Wages and Bonuses based on Annual Payroll * $166,600
5. War P and I Including Repatriation $1,604,700
6. Consumable Stores, Slop Chests, and Leased Equipment $42,000
7. Master's cash $5,000

Date October 29, 1942. (Estimate)
Binder approved by Director of Wartime Insurance.

* Interment coverage without limitation in accordance with applicable decisions of Maritime War Emergency

Special Conditions and Warranties

Worldwide Trading Limits

Premium to Be Paid by War Shipping Administration

Any variation in amounts of coverage required in items two, three, four, six and seven above are held covered automatically: Provided, that any variation in excess of twenty five percent be reported as soon as practicable to the War Shipping Administration. In no event shall the liability of the War Shipping Administration exceed the actual amounts at risks in items two, three, six and seven.

[fol. 34] Endorsement No. 1 to be attached to Binder No. F. C. 944 Issued The De La Rama Steamship Company, Inc. by the War Shipping Administration.

It is warranted that:

1. The deadweight tonnage, speed and refrigerated cargo capacity as set forth in this binder are subject to certification by the American Bureau of Shipping prior to payment of loss; any variation between the speed, tonnage or refrigerated cargo capacity noted hereon, and the certification of the American Bureau of Shipping will modify the amount of insurance accordingly.

2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to this vessel accepted by the assured and any modifications or amendments thereto.

It is understood that all other terms and conditions of this binder remain unchanged.

(Signed) —— ——, (Illegible), for—Director of Wartime Insurance, War Shipping Administration.

Date October 29, 1942.

[fol. 35] Endorsement No. 2 to be attached to Binder No. F. C. 944 Issued to The De La Rama Steamship Company, Inc. by War Shipping Administration

Notwithstanding anything contained herein to the contrary, it is understood and agreed that the War Shipping Administration's liabilities for crew's interests as set forth in this binder are limited to the owners or operators personal liability to such crews because of provisions of statute or law, provisions of the crew's articles, or provisions of applicable collective bargaining agreements or other employment contracts.

It is understood that all other terms and conditions of this binder remain unchanged.

(Signed) (Illegible). For—Director of Wartime Insurance, War Shipping Administration.

Date October 29, 1942.

[fol. 36] IN UNITED STATES DISTRICT COURT

ANSWER OF THE UNITED STATES OF AMERICA—Filed Oct. 24, 1945

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of the United States of America to the libel of The De La Rama Steamship Company, Inc., in an alleged cause of contract and insurance, civil and maritime, respectfully alleges as follows:

First: Respondent denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in the article of the libel numbered First and, therefore, denies them.

Second: Respondent denies each and every allegation contained in the article of the libel numbered Second, except that it admits that at all material times it was and now is a corporation sovereign and respectfully refers all questions of law to the Court.

Third: Respondent denies each and every allegation contained in the article of the libel numbered Third, except that it admits that the American-Philippine Diesel vessel DONA AURORA was a combination cargo and passenger vessel

of about 8920 deadweight tons, having register dimensions 413.3 feet in length, 55.7 feet wide, 25.4 feet depth of hold, was built at Trieste, Italy, in 1939, was of Philippine registry and flew the American flag, and denies that it has any knowledge or information sufficient to form a belief as to libelant's ownership of the DONA AURORA at the time of her loss or libelant's ownership of the rights and claims to recovery for the loss of said vessel, and demands proof of these allegations.

[fol. 37] Fourth: Respondent admits the allegations contained in the article of the libel numbered Fourth.

Fifth: Respondent denies each and every allegation contained in the article of the libel numbered Fifth, except that it admits that libelant and respondent conducted certain negotiations and entered into a certain charter party agreement dated as of April 1, 1942 and designated as Contract No. WSA-3147-R, said contract being in two parts, Part II thereof being in the form published in the Federal Register for May 16, 1942, pages 3675-3678, and was incorporated in Part I by reference, the original of which said Part I will be produced upon the trial of this action and to which, for greater certainty, respondent begs leave to refer.

Sixth: Respondent admits the allegations contained in the article of the libel numbered Sixth.

Seventh: Respondent denies each and every allegation contained in the article of the libel numbered Seventh, except that it admits that the time charter party described in Article Fifth of this answer contained language quoted in part in Article Seventh of the libel and, for greater certainty, begs leave to refer to the original of said charter party, and that respondent has issued, promulgated and published a full form of standard hull war risk policy of the War Shipping Administration.

Eighth: Respondent denies each and every allegation contained in the article of the libel numbered Eighth, except that it admits that respondent executed and delivered to libelant a writing designated War Risks Binder R. C. [fol. 38] No. 944 on April 10, 1943, a copy of which is annexed to the libel herein to the original of which, for greater certainty, respondent begs leave to refer and that certain endorsements were at that time or subsequently duly ex-

ecuted, issued and affixed thereto, copies of which are annexed to the libel to the original of which, for greater certainty, respondent begs leave to refer.

Ninth: Respondent denies each and every allegation contained in the article of the libel numbered Ninth.

Tenth: Respondent denies each and every allegation contained in the article of the libel numbered Tenth, except that it admits that the DONA AURORA was torpedoed and sunk on December 25, 1942, and became a total loss and that, at the time of her loss, she was proceeding from a foreign country to a United States port and carried cargo for which commercial bills of lading were issued.

Eleventh: Respondent denies each and every allegation contained in the article of the libel numbered Eleventh.

Twelfth: Respondent denies each and every allegation contained in the article of the libel numbered Twelfth.

Thirteenth: Respondent denies each and every allegation contained in the article of the libel numbered Thirteenth, except that it admits that libelant has made claim for certain losses and that respondent has declined to pay the amounts demanded, and respectfully refers all questions of law to the Court.

Fourteenth: Respondent denies each and every allegation contained in the article of the libel numbered Fourteenth.

[fol. 39] Fifteenth: Respondent denies each and every allegation contained in the article of the libel numbered Fifteenth, except that it admits that respondent paid libelant all sums due and owing to libelant for charter hire under the charter party hereinabove referred to.

Sixteenth: Respondent denies each and every allegation contained in the article of the libel numbered Sixteenth.

Further Answering and for a Separate and Complete Defense to the Cause or Causes of Action Alleged in the Libel, Respondent Alleges:

Seventeenth: At all the times referred to in the libel herein, the Motor Vessel DONA AURORA was owned and operated by and for the libelant, The De La Rama Steamship Company, Inc., and was not a vessel owned by the United States of America or any corporation in which the United States or its representatives owned the outstanding

capital stock nor was she in the possession of the United States or of any such corporation nor was she operated by or for the United States or any such corporation.

Eighteenth: The alleged War Risks Binder hereinabove in this answer identified and described restated respondent's pre-existing obligation under the time charter party hereinabove in this answer identified and described to make payment of just compensation in the event of the DONA AURORA's total loss through a war risk. Both charter party and the socalled War Risks Binder provide that just compensation is to be determined in accordance with Section 902 of The Merchant Marine Act of 1936. That section in sub-section (d) thereof, U. S. Code, Title 46, Sec. 1242, sub-section (d), requires suits thereunder to resolve a dispute [fol. 40] as to the amount of just compensation to be brought either in the manner provided by Section 41 (20) or Section 250 of Title 28 U. S. Code. Under Section 41 (20) suit may only be brought in the district court if the amount demanded is not in excess of Ten Thousand Dollars ($10,000.). The libel herein on its face states a claim far in excess of that sum. Under Section 250, suit may be maintained in the Court of Claims exclusively. The libelant has failed and neglected to take any or proper steps to bring about the determination of the amount of just compensation in the manner provided in the charter party and the socalled War Risks Binder, and has failed and neglected to bring suit in the manner provided by said Section 902 of The Merchant Marine Act of 1936, amended to resolve any dispute which may exist with respect to the amount thereof or to fix and determine the amount payable as just compensation. This suit may not be maintained until the amount of just compensation payable with respect to the DONA AURORA has been fixed and determined as aforesaid as a condition precedent to any liability of the respondent therefor under the terms and conditions of the aforesaid charter party and socalled War Risks Binder.

Nineteenth: Libelant has been paid or advanced or no dispute exists with respect to all items of loss or damage claimed in the libel, except the claim for just compensation hereinabove described.

Twentieth: The socalled War Risks Binder hereinabove

identified and described in Article Eighth of this answer was not, in fact, issued until April 10, 1943, over three (3) month after the happening of the disaster resulting in the total loss of the DONA AURORA and after her actual total loss [fol. 41] was known to both libelant and respondent. The writing purporting to be an insurance binder has no effect as insurance with respect to this loss and is not an assumption of any insurable risks and is not an insurance contract within the meaning of Section 1128, Subdivision (b), Title 46 U. S. Code, or of any other provision of statute or law granting the United States or any of its agencies authority to issue insurance contracts or this Court jurisdiction to hear and determine disputes relative thereto.

Twenty First: The United States is a corporation sovereign and has not consented to be sued with respect to any of the matters or things set forth in the libel under and by virtue of the Suits in Admiralty Act of March 9, 1920, as alleged in the libel, or any other statute or provision of law, and this Honorable Court is without jurisdiction to entertain the libel herein.

Twenty Second: All and singular the premises are true.

Wherefore, respondent prays that the libel herein be dismissed with costs.

John F. X. McGohey, United States Attorney,
Proctor for United States of America, Admiralty
Division, 45 Broadway, New York 6, N. Y.

(Duly verified October 23, 1945.)

[fol. 42] IN UNITED STATES DISTRICT COURT

CONSENT ORDER AMENDING LIBEL—April 26, 1947

The respondent under date of April 23, 1947 having made a payment on account to the libellant in the sum of $750,000 with respect to the loss of the vessel DONA AURORA without prejudice to the cause or causes of action set forth in the libel and also without prejudice in the event that the Court should determine the amount due from respondent to libellant for the loss of said vessel to be less than $750,000; to whatever right the respondent may or shall have to recover any overpayment;

Now, therefore upon the subjoined consent of the proctors for the respective parties, it is

Ordered that Article Fourteenth of the libel herein be and the same hereby is amended to read:

"By reason of the premises there became due and owing from the respondent to libellant as just compensation and insurance for said vessel and in respect of other losses as aforesaid, the sum of about $2,750,000 as nearly as the same can now be estimated, together with interest thereon, the payment of which has been duly demanded, no part of which has been paid except that a payment on account of said loss was made by [fol. 43] respondent to libellant on April 23, 1947 in the amount of $750,000."

and it is further

Ordered that said payment on account is without prejudice to the libellant's cause of action for the loss of said vessel and to all other claims and demands set forth in the libel, and without prejudice to any defenses, counter-claims, set-offs or rights of recoupment which respondent now has or may have against the libellant herein, including any right the respondent may have to recover any overpayment in the event that the amount due from respondent to libellant for the loss of said vessel should be determined to be less than said payment on account in the amount of $750,000.

Dated: New York, N. Y., April 26, 1947.

Wm. Bondy, U. S. D. J.

We hereby consent to the entry of the foregoing order.

Dated: New York, N. Y., April 23, 1947.

Burlingham, Veeder, Clark & Hupper, Proctors for Libellant. John F. X. McGohey, by Edward L. Smith, Proctors for Respondent.

[fol. 44] IN UNITED STATES DISTRICT COURT

CONSENT ORDER AMENDING LIBEL—May 19, 1947

The respondent under date of May 11, 1947, having made a further payment on account to the libellant in the sum of $250,000, with respect to the loss of the vessel

DONA AURORA without prejudice to the cause or causes of action set forth in the libel and also without prejudice in the event that the Court should determine the amount due from respondent to libellant for the loss of said vessel to be less than $1,000,000 (the total amount of payments on account) to whatever right the respondent may or shall have to recover any overpayment;

Now, therefore, upon the subjoined consent of the proctors for the respective parties, it is

Ordered that a Article Fourteenth of the libel herein be and the same hereby is further amended to read:

> "By reason of the premises there became due and owing from the respondent to libellant as just compensation and insurance for said vessel and in respect of other losses as aforesaid, the sum of about $2,750,000 as nearly as the same can now be estimated, together with interest thereon, the payment of which has been [fol. 45] duly demanded, no part of which has been paid except that a payment on account of said loss was made by respondent to libellant on April 23, 1947, in the amount of $750,000, and a further payment on account of said loss was made by respondent to libellant on May 11, 1947, in the amount of $250,000";

and it is further

Ordered that said payments on account are without prejudice to the libellant's cause of action for the loss of said vessel and to all other claims and demands set forth in the libel, and without prejudice to any defenses, counter-claims, set-offs or rights of recoupment which respondent now has or may have against the libellant herein, including any right the respondent may have to recover any overpayment in the event that the amount due from the respondent to libellant for the loss of said vessel should be determined to be less than said payments on account totaling $1,000,000.

Dated: New York, N. Y., May 19, 1947.

Jno. C. Knox, U. S. D. J.

We hereby consent to the entry of the foregoing order.

Dated: New York, N. Y., May 16, 1947.

John F. X. McGohey, Proctors for Libellant, by Edward L. Smith, Proctors for Respondent, Burlingham, Veeder, Clark & Hupper.

[fol. 46] In United States District Court

Order of Reference—October 4, 1948

Libellant having moved on September 29, 1948 for a reference to determine the value of the steamship Dona Aurora in the above entitled cause, and the Court, after hearing argument by the proctors for the respective parties for and against said motion, and after due deliberation, having granted said motion;

Now, on motion of Burlingham, Veeder, Clark & Hupper, proctors for the libellant, it is

Ordered, that the above entitled cause be and the same hereby is referred to Gray Williams, Esq., Commissioner, to determine in advance of trial of any other issue in accordance with the applicable principles of law, the issue of the just compensation for the loss of the steamship Dona Aurora, which the libellant, if hereafter granted a final decree herein, shall be entitled to recover (less all payments on account heretofore made) in respect of the total loss of said steamship, and to report the same to the Court with all convenient speed.

Jno. C. Knox, U. S. D. J.

Dated, New York, N. Y., October 4, 1948.

[fols. 47-855] The foregoing order may be entered without other or further notice to respondent.

Dated, New York, N. Y., October 4, 1948.

John F. X McGohey, United States Attorney, by Edward Smith, Proctor for Respondent.

[fol. 856] IN UNITED STATES DISTRICT COURT

RESPONDENT'S EXCEPTIONS TO SPECIAL COMMISSIONER'S REPORT—April 11, 1950

The United States of America hereby excepts to the report dated March 20, 1950 filed by the Special Commissioner on March 23, 1950 on the following grounds:

(1) It determined just compensation for the motor vessel DONA AURORA in the sum of $2,100,000 instead of $1,000,000;

(2) It found that the respondent was obligated to pay the libelant a value of the motor vessel DONA AURORA as of April 1, 1942, a date prior to the date of the requisition of the use of the said vessel by the United States, instead of the value of said vessel on December 25, 1942, the date on which the vessel was lost;

(3) It found that the transactions between the United States Maritime Commission relating to the sales of 18 Type CIB vessels referred to in Respondent's Exhibits 21a to 21r inclusive, did not constitute a market upon which to base the value of the motor vessel DONA AURORA;

(4) It determined just compensation for the motor vessel DONA AURORA in a sum in excess of the sum of $1,960,000 [fol. 857] claimed by the libelant in Respondent's Exhibit 4 to constitute the fair value of the vessel;

(5) It did not give any consideration to the original cost of $904,360 paid by the libelant for the construction of the motor vessel DONA AURORA;

(6) It failed to give any consideration to the fact that between May 19, 1942, the date on which the Administrator, War Shipping Administration gave notice to the libelant of the requisition of the use of said vessel by said Administrator, and December 25, 1942, the date of the loss of the motor vessel DONA AURORA, said vessel was under requisition for use by said Administrator, War Shipping Administration;

(7) It failed to properly take into account the depressing effect on the value of the motor vessel DONA AURORA by reason of Government restrictions on her use, earnings and transfer;

(8) It determined that the domestic reconstruction cost on a multiple ship basis less depreciation offered the most nearly reliable guide for determining valuation of a vessel during the year 1942;

(9) It determined that the domestic cost of reconstruction of the motor vessel DONA AURORA was the cost of reconstruction to be considered;

(10) It failed to give any consideration to the estimates of libelant's witnesses that the cost of reproducing the [fol. 858] motor vessel DONA AURORA in the United States in October of 1939, the date on which the construction of said vessel was completed in Italy, was approximately 100% in excess of the cost of constructing said vessel in Italy as of October, 1939;

(11) It gave consideration to various insurance valuations placed on the motor vessel DONA AURORA and her sister ships by the libelant, which valuations were not supported by appraisals for insurance purposes;

(12) It held that libelant should recover as just compensation for the motor vessel DONA AURORA the full value of the vessel as of the time and place of her delivery to the Government, regardless of the amount by which that value was enhanced by the causes necessitating her taking;

(13) It failed to find the sum by which the DONA AURORA's value at the time of delivery to the Government or loss was enhanced by the Government's need for vessels in the prosecution of the war which necessitated the requisitioning of many of them and failed to reduce the amount awarded to libelant by the amount of such enhancement.

Dated, New York, N. Y., April 11, 1950.

[fol. 859] Yours, etc., Irving H. Saypol, United States Attorney, Proctor for Respondent, Office and P. O. Address: 45 Broadway, Borough of Manhattan, City of New York.

To Burlingham, Veeder, Clark & Hupper, Esqs., Proctors for Libelant, 27 William Street, New York, N. Y.

[fol. 860] IN UNITED STATES DISTRICT COURT

LIBELLANT'S EXCEPTIONS TO SPECIAL COMMISSIONER'S REPORT—April 11, 1950

Libellant in the above-entitled suit hereby excepts for the following reasons to the Report of Gray Williams, Commissioner appointed by order of this Court dated October 4, 1948, which report was filed on March 23, 1950:

1. Because the Commissioner found that the sum which in all probability the DONA AURORA would have brought at a voluntary sale on April 1, 1942 was $2,100,000 only, and failed to find that said sum was substantially in excess of $2,100,000.

2. Because the Commissioner found that the fair market value of the DONA AURORA on December 25, 1942 amounted to the sum of $2,082,000 only, and failed to find that the fair market value of said vessel on said date was substantially in excess of $2,082,000.

3. Because the Commissioner, in computing the sound depreciated value of the DONA AURORA on April 1, 1942 and December 25, 1942 applied an excessive depreciation rate of 3⅓% progressive, and failed to apply a depreciation rate of 2½% progressive.

[fol. 861-895] 4. Because the Commissioner failed to find that libellant, as a part of just compensation for the loss of the DONA AURORA, is entitled to compensation for delay in payment measured by interest on the award herein at the rate of 6% per annum from the date of said vessel's loss, December 25, 1942, but on the contrary found that the Suits in Admiralty Act limits the libellant to interest on any award to the rate of 4% per annum from the date of filing of the libel herein on December 22, 1944.

5. Because the Commissioner erred in admitting in evidence Respondent's Exhibit 19 for Identification purporting to be a certificate issued by the Assistant Secretary of the United States Maritime Commission to the effect that there was never any "determination" of just compensation made by the War Shipping Administration or the United States Maritime Commission for the DONA AURORA, which exhibit

was not competent, relevant or material as to any issue before the Commissioner.

Dated: New York, N. Y., April 11, 1950.

Burlingham, Veeder, Clark & Hupper, Proctors for Libellant, Office & P. O. Address, 27 William Street, Borough of Manhattan, New York 5, N. Y.

[fol. 896] IN UNITED STATES DISTRICT COURT

ORDER CONFIRMING SPECIAL COMMISSIONER'S REPORT—Aug. 4, 1950

Libellant and respondent having respectively filed exceptions to the report of Gray Williams, Esq., appointed by order of this Court dated October 4, 1948, Commissioner to determine in advance of the trial of any other issue, in accordance with the applicable principles of law, the issue of just compensation for the loss of the steamship DONA AURORA to which the libellant, if hereafter granted a final decree herein, shall be entitled (less all payments on account heretofore made), which report was dated March 20, 1950, and duly filed herein March 23, 1950.

And said exceptions having duly come on for hearing and been argued at a term for the hearing of motions before Honorable Irving R. Kaufman, United States District Judge, on May 24, 1950.

And the Court after hearing the advocates for the respective parties and after due deliberation, having rendered its opinion filed July 27, 1950;

Now, it is, by the Court:

Ordered that said report of Gray Williams, Esq., Commissioner, filed herein March 23, 1950, be and the same hereby is confirmed in all respects, except that the valuation date from which to determine the amount of libelant's loss is hereby determined and fixed to be December 25, 1942, [fol. 897] instead of April 1, 1942 as determined by said Commissioner, and his report is hereby modified accordingly and as so modified is confirmed; and it is further

Ordered that respondent's exceptions to said Commissioner's report be and they hereby are in all respects overruled except as to that portion of respondent's exception (2) directed to December 25, 1942, being fixed as the valuation date for the determination of loss, in which respect said exception (2) is hereby sustained; and it is further

Ordered that libellant's exceptions to said Commissioner's report herein be and they hereby are in all respects overruled; and it is further

Ordered that the just compensation allowance and amounts libellant shall be entitled to recover if awarded a final decree for the loss of the steamship DONA AURORA as of December 25, 1942, be and the same hereby is determined and fixed to be the sum of Two Million Eighty-Two Thousand Dollars ($2,082,000.00); and it is further

Ordered that in the event that libellant is granted a final decree herein, it shall be entitled to recover from respondent:

(1) The balance of the $2,082,000 remaining unpaid after deduction of two payments on account, being $750,000 paid April 23, 1947 and $250,000 paid May 16, 1947, said balance being $1,982,000;

(2) Interest on the aforesaid $2,082,000 at the rate of 4% per annum from December 22, 1944 when the libel was filed through April 23, 1947, when $750,000 on account was paid, being $194,396.13;

[fols. 898-1503] (3) Interest on $1,332,000 at the rate of 4% per annum from April 24, 1947 to May 16, 1947, both inclusive, being $3,357.31;

(4) Interest on $1,082,000 at the rate of 4% per annum from and including May 17, 1947 to the date on which judgment is entered;

(5) The taxable costs of this suit, which remain to be determined;

(6) Interest on the judgment, if and when entered, at the rate of 4% until paid;

and it is further

Ordered that the fee of said Commissioner be and the same hereby is determined and fixed at $7,500, plus $66.30

for his necessary disbursements; and that said two items totaling $7,566.30, having been duly paid by libellant and receipted for by said Commissioner in accordance with Admiralty Rule 26 of this Court, be included with other taxable costs if and when final judgment shall be entered for libellant.

Dated: New York, N. Y.
August 4, 1950.

Irving R. Kaufman, U.S.D.J.

[fol. 1504] In United States District Court

Findings of Fact and Conclusions of Law—June 27, 1951

Findings of Fact

1. At all material times libelant was a Philippine corporation having its principal place of business in the United States within the Southern District of New York and at all such times was the owner of the motor vessel Dona Aurora which was registered at Iloilo, Philippine Islands.

2. Libelant is the proper party to effect the recovery in this suit.

3. The claim asserted by libelant is for losses or the amount thereof on account of insurance as to which prior to the filing of the libel herein, December 22nd, 1944, disagreement had arisen between libelant and respondent.

4. On March 27th, 1942 the Administrator of the War Shipping Administration sent a telegram to the Libelant advising it that the War Shipping Administrator desired to charter the motor vessel Dona Aurora on a time charter basis at a specified rate of charter hire.

5. On March 30th, 1942, and prior to the delivery of the Dona Aurora to the War Shipping Administration, war [fol. 1505] risk binder T. C. 1142 was prepared and issued by respondent's War Shipping Administration, Division of Insurance, insuring libelant against war risks only, with respect to said vessel, in the total amount of $1,500,000 from time of delivery of said vessel to the War Shipping Administration, about April 1st, 1942, "to termination of

charter or until ——, whichever may first occur." But said binder was not delivered to libelant until May 9th, 1942.

6. On April 1st, 1942, said vessel Dona Aurora was delivered by the libelant to the War Shipping Administration, which acknowledged that such delivery was made under the terms of a time "charter to be executed later"; that such time charter was not executed by libelant and respondent until April 24th, 1942, effective "as of March 27th, 1942," and was for the period of about one year. War risk valuation was also fixed thereunder at $1,500,000, the same as that set forth in the binder issued by the War Shipping Administration on March 30th, 1942 and referred to in Finding 5 hereof.

7. On May 20th, 1942, respondent by telegram of that day requisitioned the Dona Aurora, stating as follows:

> "War Shipping Administration has previously chartered from you the following vessels: Dona Aurora * * *.
>
> "In order to carry out requisition program now in effect all of the above vessels are hereby requisitioned for use under time form charter * * *.
>
> [fol. 1506] "Requisition charter in form set forth in Federal Register of May 16, 1942 together with rates and insurance valuations contained in General Order 8 and 9 published Federal Register May 16, 1942 will be tendered to you as soon as possible. Please advise immediately whether you desire to have these rates and valuations made effective as of time of delivery under current charter * * *."

8. Said time form charter as published in the Federal Register of May 16th, 1942 had made provision for war risk insurance valuation under Option I according to said General Order 9 formula (applicable only to vessels built prior to January 1st, 1935 and, therefore, not available to libelant), or alternatively under Option II in an amount equivalent to just compensation as determined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended.

9. In Part II of said standard form of charter as pub-

lished May 16th, 1942, Clause 20 thereof, provided that "unless otherwise mutually arranged, at all times during the currency of this charter" the respondent

> "shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, * * * insured for and valued at the amount set forth in Part I which insurance shall be made payable to the persons entitled thereto; (ii) all war risk insurance, as required, on the * * * actual value of the Vessel's unused consumable stores * * *."

[fol. 1507] 10. Libelant replied to the War Shipping Administration's notification by telegram on June 15th, 1942, advising of its choice of rates. As to insurance valuation, it advised that the vessel was excepted from the application of General Order No. 9 formula for fixing insurance valuations referred to in said requisition notice. Thus, Option II was the only choice open to libelant.

11. Section 902 of the Merchant Marine Act, 1936, as amended (Title 46 U. S. C. A. 1242) had imposed on respondent the duty of transmitting "at the time of the taking or as soon thereafter as the exigencies of the situation may permit" to the owner in possession of any vessel the use of which was requisitioned, a charter setting forth the terms which, in the War Shipping Administrator's judgment should govern the relations between the United States and such person.

12. No charter was delivered at or about the time of the requisition of the vessel or until long thereafter—in March 1943, with an addendum in June 1944, as set forth in a subsequent Finding. The failure to deliver a charter as required was due to the war activities. Paper work involved in the preparation and formal execution of requisition charters lagged many months behind the taking of the vessels by requisition.

13. The requisition of the Dona Aurora on May 20th, 1942 terminated the time charter of March 27th, 1942 and thereupon the binder of March 30th, 1942 was terminated by its terms as a result of said requisition. Even assuming

that said binder was not cancelled on this occasion, it was cancelled and superseded by the binder of October 29th, 1942, referred to in the next Finding of Fact.

[fol. 1508] 14. On October 29th, 1942 war risk binder R. C. 944, together with two endorsements attached thereto, was issued by respondent's War Shipping Administration, Division of Insurance. This binder specifically cancelled and superseded the aforesaid March 30th, 1942 binder and insured libelant against war risks only with respect to said Dona Aurora "from time of delivery to War Shipping Administration about April 1st, 1942 to termination of charter" and described the amount of such insurance and the value of said vessel as being "as per charter." This binder was the only valid one outstanding and in effect on December 25th, 1942, the date of the loss of the Dona Aurora. A copy of the said October 29th, 1942 binder was delivered to libellant on April 12th, 1943.

On October 29th, 1942 another binder was prepared by respondent for inter-office use in connection with the allocation of premium payments for insurance on the vessel into a revolving fund and such allocations or estimates of premiums were for the period from April 1st, 1942 to September 30th, 1942. The amount of insurance stated therein was "Just compensation Option II" (i. e. the war risk insurance set forth in the standard requisition charter published May 16th, 1942).

15. On December 25th, 1942, while proceeding from South African ports to the United States with commercial cargo loaded at said ports under commercial bills of lading, said vessel Dona Aurora was sunk by enemy action and became a total loss while in respondent's service under requisition as above set forth.

[fol. 1509] 16. On or about March 18th, 1943, a requisition time charter (Contract No. WSA-3147-R) was signed by libelant and respondent effective as of and from April 1st, 1942.

17. On June 2nd, 1944, Addendum No. 1 amending the aforesaid requisition charter No. WSA-3147-R was signed by libelant and respondent effective as of and from April 1st, 1942. Said requisition charter, as amended, set forth the respondent's insurance undertaking with respect to

said vessel DONA AURORA in the same terms as contained in the standard form requisition charter as published May 16th, 1942, providing in Part I:

"E. War Risk Insurance Valuation:

* * * * * * * *

"Option II—Just compensation to be determined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended, for any loss or damage due to the operation of a risk assumed by the charterer under the terms of this Charter to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage."

* * * * * * * *

and in Part II

"20. Unless otherwise mutually arranged, at all times during the currency of this charter the charterer shall provide and pay for or assume: (i) insurance on the Vessel under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, * * * insured for and valued at the amount set forth in Part I, which insur- [fol. 1510] ance shall be made payable to the persons entitled thereto; (ii) all war risk insurance, as required, on the * * * actual value of the Vessel's unused consumable stores * * *."

18. The libelant had no war risk insurance coverage on said vessel DONA AURORA except as provided in said insurance binder R. C. No. 944, dated October 29th, 1942, and as required by said standard form of requisition charter and said requisition charter No. WSA-3147-R, as amended.

19. Upon taking the vessel DONA AURORA under requisition, respondent was thereupon obligated to protect libelant with war risk insurance thereon in accordance with Option II contained in Part I and Clause 20 contained in Part II of the standard form requisition time charter as published in the Federal Register May 16th, 1942. The aforesaid October 29th, 1942 binder and the aforesaid re-

quisition charter, as amended, confirmed the transaction de facto concluded by libelant's acquiescence in the aforesaid requisition of May 20th, 1942, and respondent's continued use of the vessel DONA AURORA from its requisition until the date of its sinking on December 25th, 1942.

20. The libelant received in payment from respondent for the use of said vessel while under requisition from April 1st to December 25th, 1942 inclusive, the charter hire specified in the aforesaid requisition time charter, No. WSA-3147-R, as amended.

21. Said vessel DONA AURORA at all material times was operated by libelant for respondent under said requisition [fol. 1511] time charter as a merchant vessel, with master and crew employed by libelant and carried nothing but commercial cargo under regular commercial bills of lading from September, 1942 until December 25th, 1942, the date of the loss of the vessel.

22. The value of libelant's consumable stores lost on the DONA AURORA as aforesaid and likewise covered by respondent's insurance undertaking, has been fixed by stipulation by libelant and respondent at $8,693.25.

23. The value of said vessel DONA AURORA has been determined at $2,082,000 upon the reference in advance of trial herein pursuant to order of this Court entered October 4th, 1948, and confirmatory order entered August 4th, 1950.

24. There was no lawful requirement as a condition precedent to the maintenance of this suit, which was instituted pursuant to Title 46 U. S. C. A. 1128d, that respondent make any determination of just compensation under Title 46 U. S. C. A. 1242. In any event, the War Shipping Administration or the Maritime Commission failed or refused to act within a reasonable time after the known loss of the vessel and this constituted a determination that no amount was payable or an election waiving its right to make such determination.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this suit.

[fol. 1512] 2. The repeal of Section 1128a of Title 46, U. S. C. A. on July 25th, 1947, during the pendency of this action, did not divest this Court of jurisdiction.

3. The total loss of the vessel DONA AURORA on December 25th, 1942 was covered by war risk insurance undertaken by respondent in an amount and at a valuation measured by just compensation as provided in Option II of the standard form of requisition time charter published in the Federal Register May 16th, 1942, as well as in the insurance binder (with attached endorsements) prepared by the Insurance Division of respondent's War Shipping Administration October 29th, 1942, and in the aforesaid requisition time charter, as amended, effective as of and from April 1st, 1942. The libelant had no war risk insurance coverage on said vessel DONA AURORA except as above set forth.

4. Said insurance by respondent was authorized under Section 1128a, Title 46 U. S. C. A., as well as under Section 1273, Title 50, App. U. S. C. A.

5. The manner in which said vessel DONA AURORA was used by respondent is not material. In any event said vessel at all material times was operated by libelant for respondent as a merchant vessel.

6. Administrative determination of just compensation by the War Shipping Administration or the Maritime Commission with respect to said vessel DONA AURORA was not made—and such a determination was not a condition precedent to commencement or maintenance of this suit. If, in fact, such condition had existed, the failure or neglect of [fol. 1513] said agencies to make a determination constituted a finding that no amount was payable or a waiver by it of its right to make such determination.

7. The respondent is liable to libelant herein for the agreed value of said vessel and of said stores upon its insurance undertaking above referred to.

8. Libelant is entitled to a final decree herein in accordance with the aforesaid order of this Court entered August 4th, 1950, wherein and whereby it was:

> "Ordered that the just compensation allowance and amounts libelant shall be entitled to recover if awarded a final decree for the loss of the steamship DONA AURORA as of December 25, 1942, be and the same hereby is

determined and fixed to be the sum of Two Million Eighty-Two Thousand Dollars ($2,082,000.00); and it is further

"Ordered that in the event that libelant is granted a final decree herein, it shall be entitled to recover from respondent:

"(1) The balance of the $2,082,000 remaining unpaid after deduction of two payments on account, being $750,000 paid April 23, 1947 and $250,000 paid May 16, 1947, said balance being $1,082,000;

"(2) Interest on the aforesaid $2,082,000 at the rate of 4% per annum from December 22, 1944 when the libel was filed through April 23, 1947, when [fol. 1514] $750,000 on account was paid, being $194,396.13;

"(3) Interest on $1,332,000 at the rate of 4% per annum from April 24, 1947 to May 16, 1947, both inclusive, being $3,357.31;

"(4) Interest on $1,082,000 at the rate of 4% per annum from and including May 17, 1947 to the date on which judgment is entered;

"(5) The taxable cost of this suit, which remain to be determined;

"(6) Interest on the judgment, if and when entered, at the rate of 4% until paid;"

Said final decree shall in addition provide for recovery by libelant from respondent of the principal amount of $8,693.25, the value of the aforesaid stores, with interest thereon at the rate of 4 per cent per annum from the date of the final decree. Libelant's taxable costs as referred to in said August 4th, 1950 order, as quoted above, shall include libelant's costs upon the trial herein March 6-7, 1951, in addition to its taxable costs in the proceedings prior to said trial.

Dated: June 27th, 1951.

Edward Weinfeld, United States District Judge.

[fol. 1515] IN UNITED STATES DISTRICT COURT

OPINION BY EDWARD WEINFELD, D.J.—June 27, 1951

A. 134-158

Appearances:

Burlingham, Veeder, Clark & Hupper, Esqs., Proctors for Libelant, Norman M. Barron, Esq., Hervey C. Allen, Esq., Roscoe H. Hupper, Esq., Of Counsel.

Hon. Irving H. Saypol, United States Attorney, Proctor for Respondent, Benjamin H. Berman, Esq., Department of Justice, Of Counsel.

EDWARD WEINFELD, D.J.

Libelant was the owner of the motor vessel, the Dona Aurora, which had been requisitioned by the War Shipping Administration in April 1942. It was torpedoed and sunk on December 25th, 1942. This libel was filed thereafter upon a claim for war risk insurance pursuant to Title 46 U. S. C. A. 1128d.

[fol. 1516] The amount which libelant is entitled to recover for the loss of the vessel, if awarded a final decree, has been fixed at $2,082,000 by an order of District Judge Irving R. Kaufman, following the rendition of a report by a Commissioner to whom the issue of damages had been referred in advance of trial. 92 F. Supp. 243. The remaining issues to be decided concern the right of libelant to recover.

The Government resists libelant's claim upon jurisdictional and other grounds. The facts are not in dispute, although the interpretations drawn therefrom are in conflict. They are to be considered against the background of the statutory authority under which the War Shipping Administration or its Administrator acted with respect to the Dona Aurora.

The Merchant Marine Act of 1936 set up the procedure for the acquisition of vessels by the Government when required by the national defense or during any national emergency. Upon appropriate proclamation by the President, the Maritime Commission was authorized to requisition or purchase any vessel and the owner was to be paid just compensation for the property or its use. (Ch. 858, Title IX, § 902, 49 Stat. 2015.) (46 U. S. C. A. 1242.) An amend-

ment to the Act conferred authority upon the Commission to provide marine or war risk insurance on vessels so chartered or requisitioned. (54 Stat. 689-691.) 46 U. S. C. A. 1128-1128h.[1] Authority to charter vessels on a "time [fol. 1517] charter" basis upon such terms and conditions as the Commission deemed necessary or desirable, including the issuance of insurance, was also granted by §1273 of Title 50, App.

On March 27th, 1942, the War Shipping Administration notified libelant by telegram that it desired to charter the Dona Aurora on a time charter basis. On March 30th, 1942, respondent issued its war risk insurance binder T. C. 1142 in the sum of $1,500,000 in the event of total loss of the vessel. On April 1st, 1942, the vessel was delivered by libelant to the War Shipping Administration, which acknowledged that such delivery was made under the terms of a time "charter to be executed later." In fact, this time charter was not executed and delivered to libelant until

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[1] By Executive Order the functions and duties of the Maritime Commission were in part transferred to the War Shipping Administration under the direction of an Administrator who was vested with power to:

"1. * * *

"2. * * *

"a. Control * * * the charter, requisition, and use of all ocean vessels under the flag or control of the United States, * * *."

* * * * * * *

"c. Provide marine insurance and reinsurance against loss or damage by the risks of war as authorized by Title II of the Merchant Marine Act, 1936, as amended.

* * * * * * * *

"3. The functions, duties and powers conferred by law upon the United States Maritime Commission with respect to the * * * charter, insurance * * * and requisition of vessels, * * * under the Merchant Marine Act of 1936 as amended, 49 Stat. 1985, Public Law 101 Seventy-Seventh Congress, approved June 6, 1941, * * * are hereby transferred to the Administrator; * * *." Executive Order 9054 of February 7th, 1942 (7 F. R. 837).

April 24th, 1942, effective "as of March 27th, 1942" and was for a period of about one year. War risk insurance valuation was also fixed thereunder at $1,500,000, the same as that set forth in the binder issued on March 30th, 1942, which binder was not delivered to libelant until May 9th, 1942.

[fol. 1518] On May 20th, 1942, libelant received from the War Shipping Administration notice of requisition of the Dona Aurora as follows:

> "War Shipping Administration has previously chartered from you following vessels: Dona Aurora * * *.
> "In order to carry out requisition program now in effect all of the above-vessels are hereby requisitioned for use under time form charter * * *.
> "Requisition charter in form set forth in Federal Register of May 16, 1942 together with rates and insurance valuations contained in General Orders 8 and 9 published Federal Register May 16, 1942 will be tendered to you as soon as possible. Please advise immediately whether you desire to have these rates and valuations made effective as of time of delivery under current charter * * *."

Part II of the requisition charter form published in the Federal Register of May 16th, 1942, and referred to in the foregoing telegram, contained a provision which obligated the War Shipping Administration as charterer to provide and pay for war risk insurance (Clause 20).[2]

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[2] Clause 20: "Unless otherwise mutually arranged, at all times during the currency of this Charter the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, * * * insured for and valued at the amount set forth in Part I which insurance shall be made payable to the persons entitled thereto; (ii) all war risk insurance, as required, * * * on the actual value of the Vessel's unused consumable stores * * *; and (iii) war risk protection and indemnity insurance, * * * including Owner's liabilities to officers and crew until repatriated."

[fol. 1519] The published form also contained alternative measures of war risk insurance valuation, Options I and II. Option II provided for valuation equivalent to "Just compensation to be determined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended, for any loss or damage due to the operation of a risk assumed by the Charterer under the terms of this Charter to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage."

Libelant replied to the War Shipping Administration's notification by telegram on June 15th, 1942, advising of its choice of rates. As to insurance valuation, it pointed out that the vessel—having been built after 1935—was excepted from the application of General Order No. 9 formula for fixing insurance valuations, Option I.[3] Thus, Option II was the only choice open to libelant.

Section 902 of the Merchant Marine Act of 1936 imposed on the War Shipping Administration the duty of transmitting "at the time of the taking or as soon thereafter as the exigencies of the situation may permit, * * * a charter setting for the terms which, in the Commission's (Administrator's judgment, should govern the relations between the United States and" the person entitled to possession of the requisitioned vessel. 46 U. S. C. A. 1242(c).

No charter was delivered at or about the time of the requisition or, as we shall see, until long thereafter and subsequent to the sinking of the vessel.

[fol. 1520] The first step taken by respondent was on October 29th, 1942, while the Dona Aurora was still sailing the seas, when it issued an insurance binder, described as R. C. No. 944, containing the legend, "War Risks Binder Covering Vessels Requisitioned by the War Shipping Administration, Division of Wartime Insurance, Washington, D. C." Also appearing thereon is the notation, "Cancels

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[3] The Dona Aurora was built and delivered in 1939. Option I did not apply to vessels constructed pursuant to construction contracts entered into subsequent to January 1st, 1935. It contained a provision, "That if said General Order No. 9 does not set forth a formula for ascertaining such valuation, then Option II below shall apply;* * *."

and supersedes Binder T. C. 1142"—that issued on March 30th, 1942.

The Binder of October 29th, 1942, recites that the War Shipping Administration "insures against War Risks * * * listed in schedule below: As required by Article 20 of the Charter Party:." The duration of the binder is stated as:

> "From Time of delivery to War Shipping Administration about April 1, 1942
> "To Termination of Charter"

and the value and amount for hull coverage are listed, "As per charter."

It also contained two attachments; and endorsement No. 1 thereof, likewise dated October 29th, 1942, warranted that:

> "2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to the vessel accepted by the assured and any modifications or amendments thereto.
>
> "It is understood that all other terms and conditions of this binder remain unchanged."

[fol. 1521] The Dona Aurora was sunk by an enemy submarine on December 25th, 1942. On January 4th, 1943, the War Shipping Administration gave libelant preliminary notice of the loss and thereafter on September 15th, 1943, served conclusive notice of its actual total loss.

It was not until March 18th, 1943, that the requisition time charter was delivered to libelant and subsequently under date of June 2nd, 1944, addendum No. 1 thereto was executed and delivered. Both the requisition time charter and the addendum were made effective "as of April 1st, 1942," the date of the original delivery of the vessel to respondent. The addendum sets forth in haec verba the Option II war risk insurance valuation provision as contained in the Federal Register form of May 16th, 1942.[4]

[4] 7 F. R., p. 3674, Part 1.E.

The binder of October 29th, 1942, although issued by respondent on that day, was not delivered to, or received by, libelant until April 12th, 1943—some three months after the loss had occurred.

Following the sinking of the vessel, libelant's efforts extending over a period of almost two years to secure a satisfactory adjustment of its claim for the loss of the Dona Aurora were fruitless. This libel was filed just three days short of the two year limitation period in the Suits in Admiralty Act.

The principal and preliminary question is one of jurisdiction.[5]

[fol. 1522] The action was commenced pursuant to § 1128d of Title 46, which provides:

> "In the event of disagreement as to a claim for losses or the amount thereof, on account of insurance under * * * this title, an action may be brought against the United States in the district court * * *. Said suits * * * shall proceed and shall be heard and determined according to the provisions of Section 741-752 of this title (Suits in Admiralty Act) insofar as such provisions are not inapplicable and are not contrary to or inconsistent with the provisions of sections 1128-1128h of this title."[6] 46 U. S. C. A. 1128d.

This provision, part of the amendment to the Merchant Marine Act of 1936, was designed to confer jurisdiction upon District Courts to hear claims arising out of the conduct of the Government's insurance business, authorized by that amendment. United States Lines Co. v. United States, 52 F. Supp. 758; Standard Oil Company v. United States, 267 U. S. 76. The section was repealed on July

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[5] A defense by the respondent that this Court was without jurisdiction as it did not involve a war risk insurance claim but was a just compensation claim under Section 902 of the Merchant Marine Act and hence only the Court of Claims had jurisdiction, has been abandoned (R. M. 77) [R. 961].

[6] June 29th, 1940 (54 Stat. 689-691, ch. 447, "secs. 221-223").

25th, 1947, during the pendency of this action.[7] Concededly, the repealer did not contain a saving clause preserving actions previously instituted.

Respondent's position is that the repeal of § 1128d, almost three years after the commencement of this suit and during its pendency, immediately divested this Court of jurisdiction and that libelant is relegated to the Court of Claims for enforcement of a claim for just compensation [fol. 1523] under 28 U. S. C. A. 1491, formerly 28 U. S. C. A. 250. It relies in the main upon Kline v. Burke Construction Company, 260 U. S. 226, that jurisdiction having been conferred by Congress, may at its will be "taken away in whole or in part; and if withdrawn without a saving clause all cases though cognizable when commenced must fall." However, the answer to the attack on jurisdiction is found in a statute intended to meet the very situation which here exists and which must be read together with the repealing statute, 1 U. S. C. A. 109 (formerly 1 U. S. C. A. 29), which provides:

> "Repeal of statutes as affecting existing liabilities.
> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. July 30, 1947, c. 388, § 1, 61 Stat. 633."

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[7] 61 Stat. 449. Senate Joint Resolution 123, Public Law 239, entitled, "Joint Resolution to Terminate Certain Emergency and War Powers."

This provision is to be incorporated in and construed as part of subsequent repealing statutes unless a contrary [fol. 1524] Congressional intent, either by express declaration or necessary implication is clear. Great Northern Railway Company v. United States, 208 U. S. 452. The repealing statute of July 25th, 1947 contains no express language extinguishing liability previously incurred under the acts so repealed or any evidence of such Congressional intent. On the contrary, the Congressional purpose was directed toward the termination of the war and emergency powers contained in more than sixty statutes, most of them temporary and enacted since the beginning of World War II and no longer considered essential to the war effort.[8]

The precise issue involving both the statute and repealer relied upon by respondent, has already been determined adversely to the respondent's contention by the Ninth Circuit in United States v. McNair, 180 F. 2d 273. The Court raised the issue sua sponte after it discovered, following the submission of the appeal, that § 1128d had been repealed by the Joint Resolution of July 25th, 1947, and held (p. 274): "We are of the opinion that the liability hereafter stated having been incurred by the United States prior to the repeal of the Act of June 29, 1940,[9] the right of recovery therefor continued to exist under 1 U. S. C. A. § 29, R. S. § 13, * * *."

The respondent stresses both Kline v. Burke Construction Company, supra, and Hallowell v. Commons, 239 U. S. 506. Neither is apposite to the situation at bar.

In the Kline case the Supreme Court held that a Federal Court may not enjoin parties in an action in personam [fol. 1525] from proceeding with a State Court action also in personam and involving the same subject matter. The Court held that the right to maintain an action in the Federal Courts on the ground of diversity is not one granted by the Constitution—that with the exception of the Supreme Court, whose jurisdiction is derived directly from the Constitution, every other Court derives its jurisdiction wholly from Congress. The Court stated by way of dictum

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[8] Senate Report 339—80th Congress. First Session; House Report 709—80th Congress. First Session.

[9] 46 U. S. C. A. 1128d.

the common law rule that jurisdiction having been conferred by Congress may be withdrawn by it "and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall." The Court there did not consider, or was there occasion under the facts of the case, to consider, Title 1, U. S. C. A. 109.

Hallowell v. Commons, supra, concerned the administration and the affairs of Indian tribes. The suit sought to establish title to an allotment of a deceased member of the Omaha Tribe. At one time determination of this question had been vested exclusively in the Secretary of the Interior but had been withdrawn by statute and jurisdiction transferred to the Court. During the pendency of the action Congress enacted a law whereby jurisdiction was withdrawn from the Courts. The Act also restored to the Secretary of the Interior powers which had previously been taken from him, which included final and conclusive power to decide questions such as that at issue in the case. The Supreme Court held that the purpose of the repeal statute to revest exclusive jurisdiction in the Secretary of the Interior was abundantly clear (p. 508). "It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred [fol. 1526] upon the courts of the United States." Moreover, it was held that no substantive right was taken away by the Act but simply changed the tribunal to hear the case.

The Government also emphasizes that libelant's filing of a petition for just compensation in the Court of Claims is recognition by it of the divestiture of jurisdiction. However, the petition was filed in that Court on December 6th, 1948, shortly before the expiration of the six-year statute of limitations there applicable, undoubtedly, as a precautionary measure should respondent succeed in the instant suit. In any event, such excess of caution cannot be determinative of the jurisdictional point.

The attack on jurisdiction cannot be sustained. The liability having been incurred by respondent prior to repeal and in the absence of express language in the repeal statute, evidencing a purpose to extinguish liability, the action is maintainable under § 1128d of Title 46.

The other points raised by respondent with respect to

alleged lack of jurisdiction under the Suits in Admiralty Act and the Public Vessels Act do not require discussion since § 1128d of Title 46 provides that actions brought thereunder are to be determined according to the Suits in Admiralty Act (46 U. S. C. A. 741-752) insofar "as such provisions are not inapplicable and are not contrary to or inconsistent with the provisions of Sections 1128-1128h * * *."

The Government next contends that the delivery of the war risk insurance binder by the War Shipping Administration after the known loss of the vessel was ultra vires and void. This precise defense has been determined adversely to its position in United States v. Leahy, 3 Cir., 148 F. 2d 462, sub. nom affirming National Bulk Carriers, Inc. [fol. 1527] v. United States, 56 F. Supp. 765, which held (p. 769): "That the binder was issued after the loss occurred is immaterial. Clearly at the time the insurance binder was issued all parties knew the vessel was a total loss as a result of disaster at sea." However, it is claimed that the facts in this case are distinguishable since in that case there was but a single binder which was delivered to libelant after the loss.

The substance of its argument here is that the binder issued March 30th, 1942, in connection with the time charter of April 24th, 1942, was valid and in effect on the day of the loss—that it limited liability to $1,500,000 and, therefore, the delivery on April 12th, 1943 of the binder issued on October 29th, 1942, fixing the amount of insurance at "as per charter," which measured war risk valuation by just compensation under Option II, was beyond the authority of any Governmental agency. The respondent poses the question to be determined thus: "Whether the insurance binder in effect on December 25th, 1942, the date of the loss of the DONA AURORA, was the binder dated March 30th, 1942, * * * or the binder dated October 29th, 1942, * * *."[10]

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[10] Parenthetically, it is observed that this contention urging the validity of the binder of $1,500,000 on December 25th, 1942, is contradictory of one of the original defenses that this is not an action upon a war risk insurance claim (Note 8, *ante*).

The determination of this issue must take into account the attendant circumstances under which the DONA AURORA was pressed into service. The chronology shows that the binder of March 30th, 1942, which fixed a war risk valuation of $1,500,000 was issued by respondent after notice to libelant of its purpose to charter the DONA AURORA on a time charter basis. This binder was not delivered to re- [fol. 1528] spondent until May 9th, 1942. So, too, the time charter was not delivered by the Government when it received the vessel on April 1st, 1942. It was not delivered to libelant until April 24th, 1942, but is dated "as of March 27th, 1942" and gives either party "the option of cancelling this charter at the termination of any voyage."

On May 20th, 1942, the War Shipping Administration requisitioned the vessel for use under time form charter "as of date of termination of (its) present voyage." Here, respondent was clearly exercising the option of cancelling the April 24th, 1942 charter "at the termination of any voyage."

The Government concedes the cancellation of the time charter but urges that the binder of March 30th, 1942, was not affected thereby—that the binder was an independent undertaking which continued in full force and effect until either cancelled or the obligation to make payment came into being.

Its position cannot be upheld for it disregards the terms of the binder, which provides insurance on the vessel "from the time of delivery * * * to termination of charter or until ———, whichever may first occur." Thus, when the requisition telegram of May 20th, 1942 terminated the time charter, the binder of March 30th, 1942 was terminated by its very terms.

The rate and insurance obligations of the War Shipping Administration were fixed thereafter under the applicable provisions of the standard requisition time charter, referred to in the telegram of May 20th, 1942.

The purpose of the respondent to void the binder issued in connection with the cancelled time charter is demonstrated even more pointedly by its actions subsequent to the [fol. 1529] telegram of May 20th, 1942, which stated: "Requisition charter in form set forth in Federal Register

of May 16, 1942, together with rates and insurance valuations published Federal Register May 16, 1942, will be tendered to you as soon as possible." Indeed, this was but a recognition of its statutory duty under 46 U. S. C. A. 1242(c).

It was not until October 29th, 1942, that the War Shipping Administration took the first step to carry out its obligation when it issued the binder now sought to be repudiated. Across the face of the binder we find this unequivocal language: "R. C. 944—Cancels and supersedes Binder T. C. 1142" (that of March 30th, 1942).[11] It then recites: "The War Shipping Administration hereby insures against War Risks Only the risks as listed in schedule below: As required by Article 20 of the Charter Party." The value and amount of coverage is stated "as per charter." This is clear confirmation by respondent of its obligation to provide and pay for war risk insurance as defined in Article 20 of the standard form charter under which, as we have seen, the only valuation available was Option H.[12] A rider attached to the policy further evidences its validity and effectiveness: "This insurance * * * shall be subject to the terms of the requisition charter party relative to the vessel accepted by the assured * * *."

Equally compelling is another binder prepared by the respondent on the same day, but never delivered, or intended for delivery, to libelant and retained as an inter-office memo for the purpose of computing its premium pay-
[fol. 1530] ments into a revolving fund for the insurance coverage of the vessel for the period from April 1st, 1942 to September 30th, 1942.[13] Here, the value and amount of

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[11] It is clear that "R. C." stands for "Requisition Charter" and "T. C." for "Time Charter."

[12] Note 3, *ante*.

[13] The Merchant Marine Act of 1936, as amended, Title 46 U. S. C. A. § 1128(b) set up a revolving fund to be known as the Marine and War-Risk Insurance Fund "to be used for carrying out the provisions of sections 1128-1128g of this title, * * *." The premium estimates appear to have been made in connection with allocations to the Fund.

insurance is defined even more precisely. It is stated as "Just Compensation Option II."

The recognition by the War Shipping Administration in the binder of October 29th, 1942, that its insurance obligations were governed by Article 20, Part II of the charter party form, published in the Federal Register of May 16th, 1942, the fact that the binder pursuant to that obligation defined "value" and "amount" as per charter, which provided for "full compensation under Option II," the express reference to Option II in the inter-office binder, leave no reasonable room for doubt that the words "Cancels and supersedes Binder T. C. 1142" mean what they say and say what they mean. Certainly, if the binder of March 30th, 1942 had not been cancelled when the time charter was terminated, it was effectively cancelled by the binder of October 29th, 1942.

The Government further seeks to destroy the effect of the binder of October 29th, 1942, by urging that the requisition time charter itself was not in existence at that time. It asks, "How could there be a binder in effect on either October 29th, 1942 or December 25th, 1942 fixing the amount of insurance at 'as per charter' * * * if there was no charter in existence on either of those dates?" True, the charter was not physically delivered until March 1943 and the addendum in June 1944, but it was in existence within the [fol. 1531] contemplation of the parties as effectively on May 20th, 1942, the date of requisition, as if it had been signed, sealed and delivered on that day or even as of April 1st, 1942, the date of delivery of the vessel. The very purpose of publication in the Federal Register appears to be incorporation by reference. Any doubt on the subject is dispelled when we consider that it was with full knowledge of the loss of the vessel that respondent delivered the time charter in March 1943 and the addendum in June 1944, and both were made effective as of April 1st, 1942, and that it also delivered on April 12th, 1943 the binder of October 29th, 1942, which insured the Dona Aurora "from time of delivery to War Shipping Administration about April 1st, 1942 to termination of charter."

The transactions between the parties, most of them unilateral on the part of the Government, were initiated some five months after Pearl Harbor. We were in the early

stages of organizing our military potential and drafting the nation's resources, manpower and material alike, to wage effective war against our enemies. The pressures of the moment did not permit of the niceties of formal contract negotiation and the drafting of definitive documents. The Government in the exercise of its sovereign power requisitioned the vessels it required, leaving for the future the execution and delivery of the formal documents defining the relationship between it and those whose property had been commandeered. Action in each instance preceded document signing. Congress clearly recognized the problem for the very law which empowered the Government to requisition vessels also required the Commission (Administrator) "at the time of the taking or as soon thereafter as the exigencies of the situation may permit," to transmit [fol. 1532] to the person entitled to possession of the vessel "a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person * * *." 46 U. S. C. A. 1242(c).

During the entire period the vessel was in the service of the Government, from the date of the requisition telegram of May 20th, 1942 until she went under, the libelant as the owner was without any instrument which defined the terms of the charter or respondent's obligations, other than the telegram. It is clear beyond peradventure that only the "exigencies of the situation" account for the non-delivery of the charter specified in the telegram and the necessary insurance coverage at or about the time the vessel was requisitioned. The subsequent issuance of the binder and of its later delivery and that of the charter to libelant merely formalized the prior understanding of the parties and carried out what should have, and under normal conditions would have, been done in the first instance.

On this very issue the Court of Appeals in United States v. Leahy, supra, held: "The obligation to furnish both (charter and insurance binder) to the owner in accordance with the statute arose at the time of the requisition * * *. The issuing of the papers only confirmed the transaction de facto concluded by the use of the ship in the service of the United States" (p. 466).

The parties had a right to formalize their agreement as of its original date by documents thereafter delivered. This is not unusual in business transactions where there is compelling necessity for the consummation of an agreed transaction in advance of the execution of definitive documents. Not all transactions lend themselves to leisurely and formal document drafting prior to or simultaneous with performance.

[fol. 1533] Insofar as the insurance aspect of the transaction was concerned, the Government was engaged in business and its actions and obligations are judged by normal business standards. "* * * great business houses are held to (no) less responsibility than small ones. The United States does business on business terms." United States v. National Exchange Bank of Baltimore, 270 U. S. 572; Standard Oil Company v. United States, supra.

The Court finds that the binder of October 29th, 1942 was validly issued and delivered and that it was in effect on December 25th, 1942. Any other conclusion would do violence to the facts and disregard the realistic position of the parties at the time of and the circumstances surrounding and subsequent to the requisition of the vessel.

The respondent next contends that the action was prematurely brought in that a condition precedent to its maintenance was a determination of just compensation by the War Shipping Administration or the Maritime Commission, which assumed the former's functions after October 1st, 1946. No such determination having been made by either agency, it urges dismissal on that ground. Respondent points to the addendum to the charter of June 2nd, 1944, which expressly provides in the event of loss, war risk insurance valuation under "Option II. Just compensation to be determined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended * * *." Title 46 U. S. C. A. 1242. It relies upon Section (d) of the statute, which provides:

> "In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of [fol. 1534] just compensation determined by the Commission is unsatisfactory to the person entitled thereto,

such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue and United States to recover such further sums as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by sections 41 (20) and 250 of Title 28."

This action is not based upon the foregoing section but is brought pursuant to §1128d of the same title, by reason of "a disagreement as to a claim for losses * * * on account of insurance" and there is no requirement therein for any administrative determination as to just compensation. The fact that the standard of valuation or the measure of damages in the event of loss is stated as just compensation, to be determined in accordance with §1242, does not convert the action from one grounded upon "a disagreement as to a claim for losses * * * on account of insurance" into a proceeding to be governed by the statute and rules applicable to just compensation claims. What is required is a disagreement on account of insurance. That such disagreement existed in the instant case is not open to question.

The libelant tried unsuccessfully over an extended period to obtain payment of its claim. It intensified its efforts toward the end of the two-year limitation period, only to be advised on December 11th, 1944, just two weeks before the effective date of the statute of limitations, that the War Shipping Administration had not completed its study and "that it will be impossible to settle this case before the end of the year."

[fol. 1535] The War Shipping Administration's failure to adjust the matter and its statement that it would be impossible to dispose of it by the time the statute of limitations would have afforded it a complete defense, constituted a disagreement as to an insurance claim sufficient to authorize the libelant to proceed under § 1128d. The existence of a disagreement is also evidenced by the testimony of the General Manager of libelant.

Even assuming a determination of just compensation was, in fact, required, the failure or refusal of the administrative agency to act within a reasonable time after the known

loss of the vessel constituted a determination that no amount was payable or an election waiving its right to make one. It was under a duty, where action was required, to act promptly and within a reasonable period of time and when it failed or refused to do so this was equivalent to a determination that either no amount was due or in any event one that was "unsatisfactory to the person entitled thereto." 46 U. S. C. A. §1242(d).

Libelant was not required to stand by and see its rights defeated by inaction on the part of the War Shipping Administration, nor was it required, as respondent suggests, to bring a mandamus proceeding to compel it to make a determination of just compensation if, in fact, this was required.

To uphold respondent's position is equivalent to saying that by its own refusal or neglect to perform its duty it may defeat the rights of persons entitled to payment of claims.

This defense is likewise overruled.

The libelant is entitled to a final decree in the sum of $2,082,000, less deductions for payments on account and [fol. 1536] with interest in accordance with the order of this Court entered on August 4th, 1950, all as set forth in the Findings of Fact and Conclusions of Law filed herewith.

Dated: June 27th, 1951.

Edward Wienfeld, United States District Judge.

[fol. 1537] In United States District Court

Final Decree—July 6, 1951

An order having heretofore been duly entered in the above-entitled cause on August 4, 1950, wherein and whereby the just compensation allowance and amount that libellant shall be entitled to recover herein, if awarded a final decree for the loss of the steamship Dona Aurora as of December 25, 1942, was determined and fixed to be the sum of $2,082,000, and whereby and wherein it was also or-

dered that, if granted a final decree herein, libellant shall be entitled to recover from respondent:

(1) The balance of the $2,082,000 remaining unpaid after deduction of two payments on account, being $750,000 paid April 23, 1947 and $250,000 paid May 16, 1947, said balance being $1,082,000;

(2) Interest on the aforesaid $2,082,000 at the rate of 4% per annum from December 22, 1944 when the libel was filed through April 23, 1947, when $750,000 on account was paid, being $194,396.13;

(3) Interest on $1,332,000 at the rate of 4% per annum from April 24, 1947 to May 16, 1947, both inclusive, being $3,357.31;

(4) Interest on $1,082,000 at the rate of 4% per annum from and including May 17, 1947 to the date on which judgment is entered;

[fol. 1538] (5) The taxable costs of this suit which remain to be determined;

and the above-entitled cause having come on for trial before Honorable Edward Weinfeld, United States District Judge, on the 6th and 7th days of March, 1951, and having been heard on the pleadings and proofs adduced by the respective parties and having been argued and submitted by the advocates for the respective parties; and the Court, after due deliberation, having rendered and filed its opinion in writing, dated June 27, 1951, and having made and filed its Findings of Fact and Conclusions of Law pursuant to Supreme Court Admiralty Rule 46-1/2 likewise dated June 27, 1951, holding that libelant as owner of said steamship DONA AURORA is entitled to a final decree herein against respondent for the aforesaid items and amounts fixed by the aforesaid order of August 4, 1950, and in addition for the sum of $8,693.25, being the value of libellant's consumable stores lost on said steamship, together with interest and costs as set forth in the Court's aforesaid Conclusions of Law; and libellant's costs having been taxed on notice by the Clerk of this Court at the sum of $8,881.87,

Now, it is, by the Court:

Ordered, adjudged and decreed that The De La Rama Steamship Company, Inc., libellant herein, recover of and from respondent, the United States of America:

(1) $1,082,000—being the balance of the $2,082,000 remaining unpaid after deduction of two payments on account, $750,000 having been paid April 23, 1947 and $250,000 having been paid May 16, 1947;

[fol. 1539] (2) $194,396.13—being interest on the aforesaid $2,082,000 at the rate of 4% per annum from December 22, 1944 when the libel was filed through April 23, 1947, when $750,000 on account was paid;

(3) $3,357.31—being interest on $1,332,000 at the rate 4% per annum from April 24, 1947 to May 16, 1947, both inclusive;

(4) $179,043.82—being interest on $1,082,000 at the rate 4% per annum from and including May 17, 1947 to date;

(5) $8,693.25—being the value of libellant's consumable stores lost on the steamship Doña Aurora;

(6) $8,881.87—being the costs of libellant as taxed;

amounting in all to the total sum of $1,476,377.38, hereby adjudged and decreed to be paid by respondent to libellant with interest at the rate of 4% per annum on said total sum until paid.

Dated: New York, N. Y., July 6, 1951.

Edward Weinfeld, J. U. S. D. J.

[fol. 1540] In United States District Court

Notice of Appeal—October 1, 1951

Sirs:

Please take notice that the above-named respondent hereby appeals to the Court of Appeals for the Second Circuit, from the decree in favor of the libelant and against the respondent for the sum of $1,476,377.38, entered in

the office of the Clerk of the United States District Court for the Southern District of New York on July 9, 1951, and from each and every part of said decree.

Dated: New York, N.Y. October 1, 1951.

Yours, etc. Myles J. Lane, United States Attorney, Proctor for Respondent; Office & P. O. Address: 45 Broadway, Borough of Manhattan, City of New York.

To: Messrs. Burlingham, Veeder, Clark & Hupper, Proctors for Libelant, 27 William Street, New York, N. Y.

[fol. 1541] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—October 1, 1951

[Title omitted]

The respondent being aggrieved by the decision herein dated and filed June 27, 1951 and the final decree herein entered in the Office of the Clerk of the United States District Court for the Southern District of New York on July 9, 1951, hereby prays that an appeal from said decree be allowed to the United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y. October 1, 1951.

Myles J. Lane, United States Attorney, Proctor for Respondent; Office & P. O. Address: 45 Broadway, Borough of Manhattan, City of New York.

[fol. 1542] Upon the foregoing petition, it is

Ordered that the appeal herein prayed for by the respondent be and the same hereby is allowed.

Dated: New York, N. Y. October 1, 1951.

Wm. Bondy, U. S. D. J.

[fol. 1543] IN UNITED STATES DISTRICT COURT

RESPONDENT'S ASSIGNMENT OF ERRORS—October 31, 1951

The respondent hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above-entitled action as follows:

First. The District Court erred in holding that the repeal of Section 1128d of Title 46 U. S. C. A. on July 25, 1947, during the pendency of this action, did not require the District Court to dismiss the libel herein for lack of jurisdiction (Conclusions of Law, 1, 2).

Second. The District Court erred in that, over respondent's objection, it made its order dated October 4, 1948 appointing a Special Commissioner to determine, in advance of trial, the issue of the amount of just compensation for the loss of the motor vessel DONA AURORA, which the libelant if thereafter granted a final decree, should be entitled to recover.

Third. The District Court erred in overruling respondent's exceptions to the report filed by the Special Commissioner on March 23, 1950 and in confirming said report as modified by the District Court.

Fourth. The District Court erred in holding that nondelivery of the insurance binder dated and executed on [fol. 1544] October 29, 1942 until April 12, 1943, after the known loss of the DONA AURORA, did not make that binder invalid and ineffective and prevent it from superseding the insurance binder dated March 30, 1942 (Findings of Fact 13 and 14).

Fifth. The District Court erred in finding that the binder dated October 29, 1942 and the requisition charter signed by the libelant on March 18, 1943 were only confirmatory of obligations created by libelant's acquiescence in the requisition of May 20, 1942 and that the respondent's use of the vessel from its requisition until the date of the sinking on December 25, 1942 did not purport to establish new and different obligations and that agreement upon the vessel's value for charter and insurance purposes was not open to libelant (Findings of Fact 10 and 19).

Sixth. The District Court erred in holding that libelant was not obliged to seek an administrative determination of

just compensation under Title 46 U. S. C. A., Section 1242 as a condition precedent to the maintenance of this suit and that the War Shipping Administration or the Maritime Commission failed or refused to act within a reasonable time after the known loss of the vessel, and that actions or failures to act by these agencies constituted a determination that no amount was payable or an election waiving the right to make such determination before the government should become amenable to suit (Finding of Fact 24; Conclusion of Law 6).

Seventh. The District Court erred in fixing just compensation payable to the libelant for the loss of the motor [fol. 1545] vessel DONA AURORA in the sum of $2,082,000 instead of $1,000,000.

Eighth. The District Court erred in disregarding the original cost of construction of the DONA AURORA in valuing the vessel.

Ninth. The District Court erred in disregarding the transactions consummated by the United States Maritime Commission with respect to the sales of 18 vessels comparable to the DONA AURORA pursuant to contracts in the form of constructive differential subsidy agreements, in valuing the DONA AURORA.

Tenth. The District Court erred in failing to properly take into account the depressing effect on the value of the DONA AURORA by reason of Government restrictions on her use, earnings and transfer.

Eleventh. The District Court erred in failing to give any or proper weight to the cost of constructing the DONA AURORA in Italy in October 1939.

Twelfth. The District Court erred in disregarding the DONA AURORA's foreign construction and Philippine ownership and the restrictions and disadvantages incident thereto in valuing the vessel and to the cost of reproducing her in yards outside of the United States at the date of her loss.

Thirteenth. The District Court erred in determining that the act of the War Shipping Administration in delivering the war risk insurance binder dated October 29, 1942 [fol. 1546] to the libelant on April 12, 1943, after the known loss of the DONA AURORA on December 25, 1942, was not ultra vires and void.

Fourteenth. The District Court erred in determining that the act of the War Shipping Administration in executing the requisition time charter on March 18, 1943, after the known loss of the vessel, was not ultra vires and void.

Fifteenth. The District Court erred in including in its award of just compensation for the DONA AURORA, enhancement prohibited by the provisions of Section 902a of the Merchant Marine Act of 1936 as amended (Title 46 U. S. C. A., Section 1242a).

Sixteenth. The District Court erred in not dismissing the libel herein.

Dated New York, N. Y., October 31, 1951.

Myles J. Lane, United States Attorney, Proctor for Respondent, Office & P. O. Address: 45 Broadway, Borough of Manhattan, City of New York.

To Messrs. Burlingham, Veeder, Clark & Hupper, Proctors for Libelant, 27 William Street, New York, N. Y.

[fol. 1547] IN THE UNITED STATES DISTRICT COURT

CROSS-ASSIGNMENTS OF ERROR OF LIBELLANT-APPELLEE—October 9, 1951

The De La Rama Steamship Company, Inc., libellant-appellee herein, hereby assigns error in the proceedings, decision and decree of the United States District Court for the Southern District of New York in the above entitled cause, as follows:

1. In that the Court sustained the Special Commissioner's finding that the fair market value of the DONA AURORA on December 25, 1942 amounted to the sum of $2,082,000 only, and failed to sustain the libellant's exceptions to said finding or to find that the fair market value of said vessel on said date was substantially in excess of $2,082,000.

2. In that the Court sustained the Special Commissioner's finding that the Suits in Admiralty Act limits the libellant to interest on the award at the rate of 4 percent

per annum from the date of filing of the libel herein on December 22, 1944, and failed to sustain the libellant's exceptions to said finding or to find that libellant, as a part of just compensation for the loss of the DONA AURORA, is entitled to compensation for delay in payment measured by interest on the award herein at the rate of 6 percent [fols. 1548-1553] per annum from the date of said vessel's loss on December 25, 1942.

These cross-assignments of error are made and filed pursuant to Rule 13(b) of the Rules of the United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y., October 9, 1951.

Burlingham, Veeder, Clark & Hupper, Proctors for Libellant-Appellee, 27 William Street, New York 5, N. Y.

To Myles J. Lane, Esq., United States Attorney, Proctor for Respondent-Appellant.

[fol. 1554] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, October Term, 1951

No. 216

Argued April 10, 1952 Decided July 2, 1952

Docket No. 22298

THE DE LA RAMA STEAMSHIP CO., INC., Libelant-Appellee,

against

UNITED STATES OF AMERICA, Respondent-Appellant

Before Chase, Maris and Clark, Circuit Judges

Appeal from the United States District Court for the Southern District of New York

Myles J. Lane, United States Attorney, Proctor for Respondent-Appellant, and Benjamin H. Berman, Attorney, Department of Justice, of Counsel.

Burlingham, Veeder, Clark & Hupper, Proctors for Libelant-Appellee, and Norman M. Barron, Hervey C. Allen and Roscoe H. Hupper, of Counsel.

[fol. 1555] MARIS, Circuit Judge:

This is a suit in admiralty against the United States under Section 225 of the Merchant Marine Act of 1936, as amended by the War Risk Insurance Act of June 29, 1940[1] in which the libelant sought to recover for the loss of its motor vessel Dona Aurora under a war risk policy issued by the War Shipping Administration. After a reference to and report by a commissioner, 92 F. Supp. 243, a final decree was entered in favor of the libelant in the sum of $2,080,000, with interest. 98 F. Supp. 514. The respondent took the appeal now before us and both parties have filed assignments of error attacking the decree on numerous grounds. We reach only one question, however, that of the power of the district court to proceed with the case after

[1] 54 Stat. 689.

July 25, 1947, the date upon which Sections 221 to 228, inclusive, of the Merchant Marine Act were repealed.

There is no doubt that Section 225 of the Merchant Marine Act conferred jurisdiction upon the district court to entertain the present suit on December 22, 1944, the date on which it was instituted in that court. The section specifically provided:

> "Sec. 225. In the event of disagreement as to a claim for losses or the amount thereof, on account of insurance under this subtitle, an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty in the district in which the claimant or his agent may reside, or in case the claimant has no residence in the United States, in a district court in which the Attorney General of the United States shall agree to accept service. Said suits shall proceed and shall be heard and determined according to the provisions [fol. 1556] of an Act entitled 'An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes,' approved March 9, 1920, as amended (known as the Suits in Admiralty Act), insofar as such provisions are not inapplicable and are not contrary to or inconsistent with the provisions of this subtitle."

By Section 1 of the Joint Resolution of July 25, 1947,[2] the Act of June 29, 1940, as amended, which had added Section 225, *inter alia*, to the Merchant Marine Act of 1936, was specifically repealed outright. The Joint Resolution contained no provision saving the Jurisdictional grant contained in Section 225 from repeal to the extent necessary to support suits then pending thereunder in the district courts. It necessarily follows, therefore, that the effect of the Joint Resolution was to withdraw from the district court on July 25, 1947, the date of the enactment of the resolution, the power which the court had previously to

[2] 61 Stat. 450.

entertain the present suit. *Insurance Company* v. *Ritchie*, 1866, 72 U. S. 541; *Hallowell* v. *Commons*, 1916, 239 U. S. 506; *Bruner* v. *United States*, 1952, 343 U. S. 112.

The libelant strongly urges that even though the Joint Resolution did not contain a saving clause, the absence of such a clause was supplied by Section 13 of the Revised Statutes[3] which provided as follows:

> "Sec. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless [fol. 1557] the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

The libelant also urges upon us the decision of the Ninth Circuit in *United States* v. *McNair*, 1950, 180 F. 2d 273, in which that court held that the effect of Section 13 of the Revised Statutes in this connection was to save the right of recovery in the district court in a suit which, like the one before us, had been brought under Section 225 of the Merchant Marine Act. We agree with our brethren of the Ninth Circuit that Section 13 had the effect of keeping in force those provisions of the War Risk Insurance Act of 1940 which authorized the Administrator of the War Shipping Administration[4] to issue marine insurance and reinsurance policies and to adjust and pay losses, compromise and settle claims and pay judgments. For those provisions of the statute authorized the Administrator to impose upon

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[3] Section 13, Revised Statutes, was originally enacted as Section 4 of the Act of February 25, 1871, c. 71, 16 Stat. 432. On July 30, 1947 it was enacted as Section 109 of Title 1, United States Code.

[4] By Executive Order No. 9054 (7 F. R. 837) and Sec. 228 of the Merchant Marine Act, as amended by the Act of April 11, 1942, c. 240, 56 Stat. 217, the authority previously conferred upon the Maritime Commission by the War Risk Insurance Act was vested in the Administrator of the War Shipping Administration.

the United States the contractual obligations of a marine insurer with the resultant liability to settle and pay losses resulting from the risks insured against. In other words, we think it is clear that Section 13 saved to the libelant and all others insured under war risk insurance policies issued by the Administrator under the authority of the War Risk Insurance Act of 1940 their rights under these repealed provisions of the statute to enforce in a court having jurisdiction the liability of the United States for the payment of losses within the coverage of the policies so issued. The duty of the United States to pay these losses was undoubt-
[fol. 1558] edly a "liability incurred" under the repealed statute and the latter was therefore to "be treated as still remaining in force for the purpose of sustaining any proper action * * * for the enforcement of such * * * liability."[5]

But we cannot agree that Section 13 of the Revised Statutes also saved from repeal those provisions of Section 225 which granted jurisdiction to the district court to entertain the present suit for the enforcement by the plaintiff of the liability thus saved. For it seems clear to us from the language of Section 13 that it applies only to those repealed statutes which impose penalties, forfeitures or other liabilities. Only such statutes are by the section to be treated as remaining in force after repeal "for the purpose of sustaining any proper action * * * for the enforcement of such * * * liability." The reference is thus seen to be only to those provisions of repealed statutes under which substantive rights have been acquired and not to merely procedural statutes[6] such as those which confer jurisdiction upon one court rather than another to entertain litigation for the enforcement of such rights. This is the very distinction which the Supreme Court, speaking through Justice Holmes, made in the case of *Hallowell* v. *Commons*, 1916, 239 U. S. 506, and we think it is controlling here. We therefore find the conclusion to be inescapable that the jurisdiction to entertain suits for the enforcement of rights

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[5] See *Hertz* v. *Woodman*, 1910, 218 U.S. 205, 217, 218.

[6] Compare *United States* v. *Obermeir*, 2 Cir. 1950, 186 F. 2d 243, 253.

under the War Risk Insurance Act which had accrued prior to July 25, 1947 was by the Joint Resolution of repeal enacted on that date taken from the district courts in which by Section 225 it had theretofore been exclusively vested[7] and transferred to the Court of Claims under the general [fol. 1559] grant of jurisdiction to that court to entertain suits upon claims founded upon contracts with the United States.[8]

It must be remembered in this connection that by the provisions of Section 1346 of Title 28, U. S. C., which now incorporates the Tucker Act, the district courts are given jurisdiction concurrently with the Court of Claims of civil actions *and claims* against the United States founded on contracts with the United States provided the claims do not exceed $10,000 in amount. A suit in admiralty against the United States to recover on a war risk insurance policy certainly involves a claim founded on a contract with the United States, even though it is not a civil action. It is possible, therefore, that such a claim may still be prosecuted in a district court in admiralty under Section 1346, provided the claim does not exceed $10,000. It appears that the amount recovered in the *McNair* case was only $2,125.00. Accordingly it may well be that the Court of Appeals for the Ninth Circuit thought that the jurisdiction of the district court in that case was sustainable under Section 1346 and for this reason did not discuss the jurisdictional question which is decisive here. So regarded the case is clearly distinguishable.

We think that the decision of the Emergency Court of Appeals in *150 East 47th Street Corporation* v. *Porter*, 1946, 156 F. 2d 541, is also distinguishable. It is true that the court in that case construed Section 1(b) of the Emergency Price Control Act of 1942, as amended, the language

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[7] *Levine* v. *United States*, Ct. Cl. 1948, 80 F. Supp. 674, cert. denied, 336 U. S. 936.

[8] On July 25, 1947, Section 145 of the Judicial Code of 1911 conferred jurisdiction upon the Court of Claims of claims against the United States founded upon contracts with the Government of the United States. This jurisdiction is now conferred by § 1491 of Title 28, U. S. C.

of which was quite similar to that of Section 13 of the Revised Statutes, to have the effect of saving the jurisdiction of the court to entertain after the termination of the Act a pending suit which had been brought under Section [fol. 1560] 204(e) of the Act with leave of the district court and as ancillary to a proceeding in that court. In that case there was no statutory authority for any other court to entertain the suit in question and it was necessary for the plaintiff to maintain the suit in order to protect his rights in the proceeding pending in the district court against him. In that case the Emergency Court of Appeals said (p. 544):

> "We are the more persuaded that the construction which we have placed upon the language of section 1(b) is correct because it carries out the evident intent of Congress that offenses against the act prior to June 30, 1946 shall be prosecuted and rights obtained and liabilities incurred thereunder prior to that date shall be determined by suit under the provisions of the act just as if it had not terminated. The act was drawn upon the principle that exclusive jurisdiction to pass upon questions of validity should center in this court and the Supreme Court. There is no suggestion in section 1(b) that this statutory plan was to be changed with respect to litigation pending after the act's termination date and that the complex relationship between enforcement proceedings in other courts and review proceedings in this court provided by section 204 was then to be abandoned."

This construction of section 1(b) of the Emergency Price Control Act appears to have met with the approval of Congress which by subsequent legislation[9] recognized the continuing jurisdiction of the court. In the present case, however, we have no such complex interrelated jurisdictional setup to protect the rights of litigants in the district courts while at the same time insuring uniformity and promptness

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[9] Act of July 30, 1947, c. 361, 61 Stat. 619, amending Sec. 204(e) of the Emergency Price Control Act of 1942 (which expired by its own terms, as last amended, on June 30, 1947).

[fol. 1561] in the adjudication of questions affecting the validity of pertinent administrative regulations.

Here, as we have seen, the libelant's claim was enforceable by a single suit in the district court up to July 25, 1947 and after that date by a single suit in the Court of Claims. Congress, however, made no provision for the transfer of the suit from the one court to the other on the date of repeal. We are compelled, most reluctantly in view of the time, effort and expense which have been involved in the prosecution of this suit, to conclude that the district court on July 25, 1947 lost its power to deal further with the litigation.

The decree of the district court is reversed and the case is remanded to the district court with directions to dismiss the libel for want of jurisdiction.

[fol. 1562] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of July one thousand nine hundred and fifty-two.

Present: Hon. Harrie B. Chase, Hon. Albert B. Maris, Hon. Charles E. Clark, Circuit Judges.

THE DE LA RAMA STEAMSHIP CO., INC., Libellant-Appellee,

v.

UNITED STATES, Respondent-Appellant

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and cause remanded with direc-

tions to dismiss the libel for want of jurisdiction in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 1563] [Endorsed:] United States Court of Appeals for the Second Circuit. The De La Rama Steamship Co. v. United States. 216. Judgment. United States Court of Appeals, Second Circuit. Filed July 2, 1952. Alexander M. Bell, Clerk.

[fol. 1562] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING—Filed July 17, 1952

The above named appellee, The De La Rama Steamship Company, Inc., hereby petitions under Rule 28 for rehearing of the subject-matter of this Court's July 2, 1952 decision reversing the decree of the District Court with directions to dismiss the libel for want of jurisdiction, and requests that oral argument thereon be granted.

In support of which we respectfully represent:

It appears demonstrable that the Court has misconstrued the plain meaning and legal effect of the general saving statute (Sec. 109, formerly Sec. 13, U. S. C. 1), as related to the 1947 repeal of the War Risk Insurance Act of 1940.

The Court has thereby been led "most reluctantly" (Opinion, p. 1512) to a most harsh and inequitable result which upon reconsideration, and in the light of the following points amplifying our March 26, 1952 Brief (pp. 29-34), [fol. 1563] and our April 14, 1952 Supplemental Memorandum [filed April 15], we submit should be rectified and reversed.

1. The basic error in said July 2, 1952 decision (Opinion, pp. 1508-9) is the Court's treatment of Section 225 of the 1936 Merchant Marine Act (46 U.S.C. 1128d) as a "statute" separate and distinct from the other component sections of the War Risk Insurance Act of June 29, 1940 (46 U. S. C. 1128-1128h). That insurance statute as a whole was thereupon added to said Merchant Marine Act of 1936 as a new and separate Subdivision thereof on Insurance.

Said Act of June 29, 1940 (the insurance statute) did not consist of a number of separate "statutes" *but was a single statute* made up of closely integrated *sections*, including Section 225.*

The repealing Act of July 25, 1947 (61 Stat. 450) on which the Court has relied, did not pick out Section 225 as a "statute" to be repealed, but on the contrary repealed

* The original Act consisted of Sections 221-228.

the insurance statute as a whole, i.e.: the "Act of June 29, 1940, as amended".

Not only was the Government's insurance "liability incurred under" such insurance statute. Said statute also in Section 225, one of its integral provisions, conferred exclusive jurisdiction on the District Court through the medium of the Suits in Admiralty Act,— all as part and parcel of the well considered statutory plan and purpose.

There is therefore no warrant for any departure from the plain and usual meaning of "statute" as said word is used in the general saving statute (Section 13). It would seem inescapably clear that this Court fell into fundamental error in giving the word "statute" therein a strained interpretation, i.e: to effect that the words in Section 13

> "and such *statute* shall be treated as still remaining in force for the purpose of sustaining any proper [fol. 1564] action or prosecution for the enforcement of such * * * liability ['incurred under such statute']"

should be read as if the words "provisions of such statute under which liability was incurred" had been used instead of the words "such statute"—which is not the case.

Here the repealed "statute" preserved by Section 13, having *both* created the liability incurred (Secs. 221, 222, 224) and having conferred exclusive jurisdiction on the District Court (Sec. 225), was manifestly saved not only as to "liability" but also inevitably as to "jurisdiction". Such interpretation gives plain effect and definite meaning to all parts of Section 13, whereas under this Court's construction the portion of Section 13 quoted above would be entirely purposeless and redundant in view of the opening portion of the same sentence reading:

> "The repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute, * * *".

Our proposition is that "statute" as used in Section 13 means "statute" and not something different, and that where, as here, such "statute" both created the Government's liability and conferred exclusive jurisdiction on the

District Court, Section 13 preserved both the liability and the initial jurisdictional court remedy. This conclusion would appear to be compelled by all standards of statutory construction, likewise by every applicable decision; furthermore by the inherent equities.

2. The remedial purpose of Section 13 entitles and requires it to be construed and applied, in case of question, liberally, rather than grudgingly. A strained construction can only produce not-intended detriments. Here the injured party is expressly and unquestionably by the insurance statute entitled to just compensation for a ship loss in 1942 by proceeding in the District Court, in accordance with the legislative policy evinced in said "statute". By reasonable interpretation and application of Section 13 [fol. 1565] said "statute" is readily saved *in toto*—i.e., so as to assure "enforcement" of appellee's substantive rights pursuant to Suits in Admiralty Act rules under District Court jurisdiction. Surely appellee should not now be subjected unnecessarily to fresh risks of litigation, or of vested rights being somehow disturbed, by having to proceed from scratch in another forum where other and different rules, not conformable to the policy of the war risk insurance legislation, might apply to the prejudice of appellee.

3. Referring to the suggestion (Opinion, p. 1510) that the Court of Appeals, Ninth Circuit, may well have "thought" that jurisdiction in the *McNair* case was sustainable under the Tucker Act, or that the jurisdictional question decisive here was not passed on there, we have to say that our examination of the record in that case forecloses that suggestion. Chief Judge Denman first stated that the "jurisdiction of the Court below was invoked under § 1128d" [Sec. 225]. He then called attention to the repeal of the insurance Act of June 29, 1940 by the repealing Act of July 25, 1947 and "called for and received briefs on the jurisdictional question presented." Thereafter followed the unanimous opinion of that Court that "the liability hereafter stated having been incurred by the United States prior to the repeal of the Act of June 29, 1940 [treating said 'statute' as a whole], the right of recovery therefor continued to exist under * * * § 13".

Cited in support of such conclusion were the leading Supreme Court cases of *Great Northern Railway Co.* v. *United States*, 208 U. S. 452 and *Hertz* v. *Woodman*, 218 U. S. 205, holding that the provisions of Section 13 "are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring if possible, that effect be given to all the parts of a law, the section must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13."

[fol. 1566] There was no "express declaration or necessary implication" in the July 25, 1947 Act repealing the insurance Act of June 29, 1940, as amended, evincing any purpose of the "legislative mind" to thwart the application and saving effect of the provisions of Section 13.

We submit that there is no justification for regarding the *McNair* case as distinguishable.

Respondent-appellant appears to have been content with that particular decision. No application to review it was made to the Supreme Court. Neither do we find that the contention against continuing jurisdiction of the District Court has ever been made by respondent-appellant in the other war risk insurance "just compensation" cases of the nature here pending.

4. Coming now to other cases:

Repeal of the entire War Risk Insurance Statute of June 29, 1940 by the repealing Act of July 25, 1947, did not create a situation in any way analogous to that involved in *Hallowell* v. *Commons*, 239 U. S. 506, or in *Bruner* v. *United States*, 343 U. S. 112.*

In *Hallowell* v. *Commons* the amendment (repeal) dealt solely and specifically with a provision of the statute relating to jurisdiction—it took away the jurisdiction of the Court to determine the heirs of an intestate Indian allottee and expressly vested such jurisdiction in the Secretary of

* *Insurance Company* v. *Ritchie* cited by the Court (p. 1507) was decided several years before the general saving statute (Sec. 13) was enacted.

Interior. The amendment did not affect, or purport to deal in any manner with, substantive rights or liabilities created by or "incurred under" other provisions of the basic statute which were not altered by the amendment. Justice Holmes, therefore, properly held that Section 13 could not apply, stating:

> "* * * the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds [*United States Fidelity & Guarantee Co.* v. [fol. 1567] *United States*, 209 U. S. 306], takes away no substantive right but simply changes the tribunal that is to hear the case. In doing so it evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi-paternal supervision of the general head of Indian affairs." (p. 508).

Bruner v. *United States* was an even clearer case for non-application of Section 13 since there the substantive liability was created or incurred under statutes (5 U. S. C. § 43; 56 Stat. 1068; 57 Stat. 75) entirely separate from the Tucker Act, which merely conferred jurisdiction upon the District Court concurrent with the Court of Claims. The amendment related only to the Tucker Act and did not in any way touch the substantive statute or liability created thereunder. Therefore the Supreme Court necessarily held that Section 13 did not apply.*

Bruner v. *United States* and *Hallowell* v. *Commons* could not be deemed analogous unless the Act of July 25, 1947 had only repealed Section 225 (1128d),—with the other sections of the Act of July 29, 1940 left unaffected.* Then —and only then—would *Bruner* v. *United States* and *Hallo-*

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*That *U. S.* v. *Obermeier*, 186 F. (2d) 243, has no application should be obvious. There "the pertinent substantive section, 8 U. S. C. A. § 746(a)(1), under which defendant was indicted, was not repealed" (p. 251). Only "§ 746(g) —the statute of limitations pertaining to offenses under § 746(a)(1)—was repealed."

well v. *Commons* properly be applied to divest the District Court of jurisdiction.**

No decision since the 1871 enactment of Section 13 has held that upon repeal of a statute (such as the Act of June 29, 1940) creating a substantive "liability" and conferring jurisdiction for enforcement of the same, Section 13 operates [fol. 1568] only to preserve the "liability" created by the repealed statute, but does not preserve the jurisdiction therein conferred. To the contrary, there is ample authority that in such a situation the statutory jurisdiction as well as the "liability" survives the repeal.

United States v. *Kromer* (No. 1101) and *United States* v. *Palletz* (No. 1100), 330 U. S. 812;

United States v. *Wheelbarger* (No. 1334) etc., 331 U. S. 791;

United States v. *Fortier,* 342 U. S. 160, affirming 185 F. (2d) 608, 611;

United States v. *Carter,* 171 F. (2d) 530, C. A. 5.

See also

United States v. *See,* 194 F. (2d) 100, C. A. 9.

5. Splitting up of the so-called "substantive" and "procedural" sections of the Act of July 29, 1940 would result in ignoring the latter part of Section 13 providing:

> "* * * said statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

This language clearly and in terms preserves the entire "statute" including the jurisdiction therein conferred for enforcement of the surviving "penalty, forfeiture or liability" involved. The words "any proper action or

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** In several instances the July 25, 1947 Resolution repealed only a particular "Section" of a statute, whereas it repealed the entire insurance "Act of June 29, 1940, as amended."

See our note at the foot of page 9 hereof as to the occasion for the insurance statute repeal: authority no longer needed, effectiveness limited to the present war, etc.

prosecution" can only relate to an action brought under the jurisdiction conferred by the repealed statute, since to hold otherwise would be to render this portion of Section 13 superfluous. See *150 East 47th Street Corporation* v. *Porter*, 156 F. (2d) 541, 544, where the Emergency Court of Appeals found it "beyond doubt" that the suit was "a proper suit with respect to a liability incurred under the Act prior to its termination date."

The circumstance that the Court of Claims happened to have general jurisdiction over claims against the United States founded upon contracts with the Government, while [fol. 1569] in cases arising under the Emergency Price Control Act of 1942 there was no statutory authority for any other court to entertain suits thereunder after the statute was repealed, does not afford any valid basis for distinguishing the price control cases from the present case.

This Court's decision in applying Section 13, if governing one case would perforce apply in every case, although such construction of said Section would in many instances render the same nugatory—leaving plaintiff with a substantive right without a remedy to enforce it.*

6. The Court's distinguishing of the decision of Judge Maris in *150 East 47th Street Corp.* v. *Porter*, 156 F. (2d) 541 because of the "complex interrelated jurisdictional set-up" appears to us to be unrealistic. Although the Emergency Court of Appeals may have been "more persuaded" by such set-up that its already determined construction of section 1(6) was correct (p. 544), the plain fact was that said Court's jurisdiction was preserved because the situation came within the literal terms of the saving clause in 1(b). This the Supreme Court recognized in *Wood* v. *Hills*, 334 U. S. 210, 214, with the flat statement:

> "Since the offense complained of in the case at bar occurred before the termination date, § 1(b) would apply and the Emergency Court of Appeals would still

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* As Justice Holmes said in *The Western Maid*, 257 U. S. 419, 433:

> "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp."

have exclusive jurisdiction to pass on the validity of the rent order * * *."

Again, at page 216, the Court noted:

"* * * the 'exclusive jurisdiction' provision in § 204(d) * * * was preserved by the saving clause of § 1(b)".

As already pointed out in our April 14, 1952 Supplemental Memorandum the Supreme Court has repeatedly [fol. 1570] held, *per curiam*, in cases arising under the same Act, that Section 13 (1 U. S. C. 109) also applies to preserve the exclusive jurisdiction conferred by said Act after its repeal (cases again cited at p. 7 hereof).

7. As regards the Price Control Act having been "drawn upon the principle that exclusive jurisdiction to pass upon questions of validity should center in this court (Emergency Court of Appeals) and the Supreme Court" (p. 1511, it is clear that the 1940 War Risk Insurance Act was likewise drawn upon a similar principle that exclusive jurisdiction over claims thereunder was to center in the District Courts (*Levine* v. *U. S.*, 80 F. S. 674, cert. den. 336 U. S. 936). That there has been no Congressional deviation from this principle is confirmed by the fact that in the subsequent War Risk Insurance Act, enacted September 7, 1950, 46 U. S. C. 1281-1294, Congress vested exclusive jurisdiction over war risk insurance claims thereunder in the District Court (Sec. 1292).

The sole intention of Congress in 1947 when repealing the 1940 Act was to effect "termination of war and emergency powers no longer considered essential to the war effort" (Senate Report 339—80th Congress, First Session; House Report 799—80th Congress, First Session).*

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* The chairman of the Senate Judiciary Committee had first obtained a list of the provisions of Federal Statutes affected by the termination of hostilities, the war, or emergency (Senate Document 5), concerning which a Report of the Department of Justice was then received by the Judici-

There was no "change of policy" as to the tribunal to hear cases arising under said Act; and certainly not as against the continuing jurisdiction of courts to complete cases long since pending therein and in process of final decision.

[fol. 1571] 8. Section 3(b) of Public Law 101 [55 Stat. 242, 244; 50 U. S. C. Appendix, 1273(b)] authorized the Maritime Commission (later War Shipping Administration) to provide marine and war risk insurance with respect to vessels chartered, purchased, requistioned, etc., under said Public Law 101. Said Section 3(b) further provided:

> "The provisions of Sections 225 and 226 (a) to (e), inclusive, of the Merchant Marine Act, 1936, as amended, shall be applicable in the administration of this subsection."

which had the effect of conferring jurisdiction on the District Court in the event of disagreement as to insurance claims under said Section 3(b).

When the insurance statute of June 29, 1940, including Section 225, was repealed by the July 25, 1947 Resolution, Public Law 101 was not repealed,—Section 3(b) thereof remaining in force.

This further confirms our position that the repeal of the insurance statute of June 29, 1940 (including Section 225) merely terminated the power to write further insurance thereunder and was never intended to divest the District Court of jurisdiction in any suit for insurance recovery—by virtue of insurance theretofore written and accepted by the shipowner for the protection that was indubitably necessary. Surely the protection in the case of the DONA AURORA could not be less than what was provided for other ships by virtue of Public Law 101.

9. The subject matter involved in the Court's decision of July 2, 1952 is of great importance, far beyond its effect

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ary Committee (Senate Document 42), stating as to the Act of June 29, 1940:

> "This statute may be repealed inasmuch as the authority provided thereunder is no longer needed and its effectiveness is limited to the present war (p. 88)".

in this particular case. Inquiry to date indicates that three other suits for total loss of large cargo vessels in which jurisdiction is based on Section 225 are now pending undetermined in the Southern District of New York. Similar suits are doubtless pending in other Circuits. In addition, suits to recover on war risk insurance claims other than for total loss (e.g. seamen's claims for personal injury or loss [fol. 1572] of life; claims for loss of stores, repatriation expenses, etc. etc.) are doubtless pending here and in other Circuits.

The question of law involved is precise and clean cut. If after the oral argument and reconsideration hereby requested the Court should still entertain doubt against preservation of jurisdiction herein by virtue of Section 13, we submit that it would then be appropriate to certify the question to the Supreme Court pursuant to the provisions of 28 U. S. C. 1254(3). That could be done expeditiously and precisely, solely upon the Court's certificate, without necessity of any other record.

For the reasons outlined above we earnestly request that this petition for rehearing, with oral argument at such time as shall suit the Court's convenience, be granted.

Respectfully submitted, Burlingham, Veeder, Clark & Hupper, Proctors for Appellee, The De La Rama Steamship Company, Inc., Norman M. Barron, Hervey C. Allen, Roscoe H. Hupper, of Counsel.

I hereby certify that I am one of the proctors for the appellee above named; that I have examined the foregoing petition and that in my opinion it is well founded. It is not made for the purpose of delay.

Dated: New York, N.Y., July 16, 1952.

Norman M. Barron.

[fol. 1575] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE DE LA RAMA STEAMSHIP CO., INC., Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent-Appellant

Before Chase, Maris and Clark, Circuit Judges

On Petition for rehearing.

Burlingham, Veeder, Clark & Hupper, Proctors for Appellee; The De La Rama Steamship Co., Inc., Norman M. Barron, Hervey C. Allen, Roscoe H. Hupper, of Counsel.

Per CURIAM:

Petition for rehearing denied.

Harrie B. Chase, Albert B. Maris, Charles E. Clark, C. JJ.

Filed July 29, 1952.

[fol. 1576] [Endorsed:] United States Court of Appeals, Second Circuit. Filed July 29, 1952. Alexander M. Bell, Clerk.

[fol. 1577] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of July, one thousand nine hundred and fifty-two.

Present: Hon. Harrie B. Chase, Hon. Albert B. Maris, Hon. Charles E. Clark, Circuit Judges.

THE DE LA RAMA STEAMSHIP COMPANY, INC., Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent-Appellant

A petition for a rehearing having been filed herein by counsel for the libellant-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk.

[fol. 1578] [Endorsed:] United States Court of Appeals, Second Circuit. The De La Rama Steamship Company, Inc. v. United States of America. Order. United States Court of Appeals, Second Circuit. Filed July 29, 1952. Alexander M. Bell, Clerk.

[fol. 1579] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1575] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 17, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to the question of the jurisdiction of the District Court. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1576] IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1952

No. 368

[Title omitted]

STIPULATION AS TO PRINTED RECORD—Filed November 26, 1952

It is hereby stipulated and agreed by and between counsel for the above named petitioner and the Acting Solicitor General for the United States that for the purpose of hearing and determining the case pursuant to the order of the Court entered herein November 17, 1952, the printed record shall consist of the following:

1. Libel, including Schedules A, B. C annexed thereto (R. 4-35);
2. Answer of the United States (R. 36-41);
3. Consent order amending libel dated April 26, 1947 (R. 42-43);
4. Consent order amending libel dated May 19, 1947 (R. 44-45);
5. Order of reference dated October 4, 1948 (R. 46-47);
6. Respondent's exceptions dated April 11, 1950, to Special Commissioner's report (R. 856-859);
7. Libelant's exceptions dated April 11, 1950 to Special Commissioner's report (R. 860-861);
8. Order dated August 4, 1950 confirming Special Commissioner's report (R. 896-898);

9. Findings of fact and conclusions of law dated June 27, 1951 (R. II 1504-1514);

[fol. 1577] 10. Opinion by Edward Weinfeld, District Judge, dated June 27, 1951 (R.II 1515-1536);

11. Final decree dated July 6, 1951 (R. II 1537-1539);

12. Notice of appeal dated October 1, 1951 (R. II 1540);

13. Order allowing appeal dated October 1, 1951 (R.II 1541-1542);

14. Respondent's assignment of errors dated October 31, 1951 (R. II 1543-1546);

15. Cross assignments of error of libellant-appellee dated October 9, 1951 (R. II 1547-1548);

16. Decision of the United States Court of Appeals for the Second Circuit, dated July 2, 1952 (R. II 1554-1560);

17. Judgment of said Court of Appeals filed July 2, 1952, reversing the decree of the district court and remanding the cause with directions to dismiss the libel for want of jurisdiction, etc. (R. II 1560-1561);

18. Petition for rehearing dated July 16, 1952 (R. II 1562-1572);

19. *Per curiam* decision of said Court of Appeals filed July 29, 1952, denying said petition for rehearing (R. II 1573);

20. Order of said Court of Appeals filed July 29, 1952, denying said petition for rehearing (R. II 1574).

[*Note.* There has been indicated with respect to each of the foregoing items from 1 to 20 inclusive the pages where the same are set forth in the printed record heretofore filed with the Clerk in connection with the petition herein.]

It is further stipulated and agreed that the parties or either of them may refer in their briefs and argument to the record heretofore filed in this Court for the purpose [fol. 1578] of the petition, including any part thereof which is not required to be printed pursuant to his stipulation.

Roscoe H. Hupper, Counsel for Petitioner; Robert L. Stern, Acting Solicitor General for the United States.

Dated: New York, N. Y. November 26, 1952.